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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL AUSTIN,
Petitioner,

v.

CHARLES E. HEALY, United States Marshal
for the Eastern District of New York,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Article III is violated when a magistrate makes the ultimate adjudicatory determination, specifically, to hear and decide the fundamental rights at stake in an international extradition case, with no assignment, review or supervision by an Article III Judge.

2. Whether 28 U.S.C. § 636 and 18 U.S.C. § 3184 permit a magistrate to make the ultimate adjudicatory determination, specifically, to hear and decide the fundamental rights at stake in an international extradition case, with no assignment, review or supervision by an Article III Judge.

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for the Eastern District of New York,

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**Petition for a Writ of Certiorari to the
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for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Austin respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this case. Petitioner seeks review of the magistrate's jurisdiction to order the Petitioner extraditable to the United Kingdom.

OPINIONS BELOW

The decision of the Court of Appeals denying the petition for a writ of habeas corpus is reported at 5 F.3d 598 and is at Appendix 1a-14a. The corrected order of the district court denying the petition for a writ of habeas corpus is unreported and is at Appendix 15a-26a. The Court of Appeals' order denying the petition for rehearing and suggestion for rehearing in banc is unreported and is at Appendix 27a-28a. The order of extraditability issued

by Magistrate Judge Zachary W. Carter is unreported and is at Appendix 29a-31a. The mandate from the Second Circuit is unreported and is at Appendix 32a.

JURISDICTION

The judgment of the United States District Court for the Eastern District of New York was entered April 19, 1993. A timely notice of appeal was filed May 5, 1993. The judgment of the United States Court of Appeals for the Second Circuit was entered September 21, 1993. The Court of Appeals denied the petition for rehearing November 5, 1993.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2241(a).

CONSTITUTIONAL, TREATY, STATUTORY AND RULE PROVISIONS INVOLVED

The following constitutional, treaty, statutory and rule provisions are involved in this case and are set forth at Appendix 34a-59a; Article III; Fourth and Fifth Amendments; Treaty of Extradition between the United States and United Kingdom; Supplementary Treaty of Extradition Between the United States and the United Kingdom; 18 U.S.C. § 3184 (Fugitives from foreign country to United States); 28 U.S.C. § 636 (Federal Magistrates Act); Local Rule 9 of the Joint Rules for General, Civil, Criminal, Admiralty and Magistrate Judge Proceedings in the United States District Courts for the Southern and Eastern Districts of New York (7th printing Nov. 1991).

STATEMENT OF THE CASE

This case challenges the boundaries of non-Article III jurisdiction: Do the Constitution and the statutory framework permit a magistrate to exercise the "essential attributes" of the Federal Judiciary by making the ultimate adjudicatory determination to order the extraditability of

Petitioner to a foreign country? Or do the Constitution and the statutory scheme require ultimate adjudicatory determination by an Article III Judge where the "essential attributes" of our constitutional tripartite structure and the "fundamental rights" at its core are at stake?

Here, the Clerk of the Court automatically assigned Petitioner's extradition case to a magistrate for decisions on substantial constitutional issues. The assignment occurred automatically in the sense that the Clerk performed a ministerial function pursuant to local rule, without Article III involvement.

No Article III Judge ever assigned or considered the assignment of the case to the magistrate. No Article III Judge ever considered Petitioner's case. No Article III Judge ever reviewed or accepted the magistrate's final order. The assignment and subsequent proceedings decided by the magistrate were without consent and with no Article III involvement. The magistrate heard and decided specific constitutional issues including Fourth Amendment probable cause and Fifth Amendment Due Process. Permitting a magistrate the ultimate adjudicatory authority involving issues of fundamental rights is a radical departure from the Court's decisions that an Article III Judge retain the ultimate power to issue final decisions. *See Peretz v. United States*, 501 U.S. ——, 111 S. Ct. 2661, 2669 (1991); *United States v. Raddatz*, 447 U.S. 667 (1980).

The magistrate's action affects issues fundamental to our system of government: (1) the balance of the constitutional tripartite system, (2) the role of the Article III Judiciary, and (3) the Petitioner's interest in liberty and Due Process before expulsion from the United States to stand trial in a foreign country.

The boundaries of non-Article III subject-matter jurisdiction are squarely presented in this case.

A. Proceedings Below

Petitioner Michael Austin, a United States citizen, is the subject of an international extradition request.[1]

1. Proceedings Before Magistrate

When a complaint for provisional arrest of Petitioner was filed in the United States District Court for the Eastern District of New York, the Clerk of the Court, with no possibility for an Article III Judge's involvement or exercise of discretion, assigned the matter to a United States Magistrate pursuant to Rule 9, Rules for Magistrate Judges, United States District Courts for the Eastern and Southern Districts of New York. Rule 9 provides:

> Issuance of Warrants and Hearings
>
> Pursuant to 18 U.S.C. § 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein.

Pursuant to that local rule, the Clerk automatically assigns all international extradition cases to magistrates.

The magistrate heard and decided the extradition matter—probable cause and, ultimately, certification of Petitioner's extraditability from the United States. There was no opportunity for assignment, review or supervision by an Article III Judge, other than the collateral and limited review afforded by habeas corpus proceedings.[2]

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[1] The United Kingdom seeks his extradition to stand trial for alleged violations of British law, specifically murder and conspiracy to murder.

[2] Extradition orders have been held not appealable because they do not emanate from the federal courts' authority but, rather, fall within the Executive's discretion. *Fernandez v. Phillips*, 268 U.S. 311 (1925); *In re Mackin*, 668 F.2d 122, 125-30 (2d Cir. 1981).

Habeas review of an extradition order is limited to deciding "whether the magistrate had jurisdiction, whether the offense

2. *Judicial Proceedings*

Petitioner challenged the magistrate's order in a habeas corpus action, pursuant to 28 U.S.C. § 2255, brought before the district court. Such petition, providing merely the most limited form of Article III review, was the only permissible procedure following the order of extraditability. The district court denied relief.

Petitioner filed an appeal pursuant to 28 U.S.C. §§ 1291, 2241 and 2253. The appeal, limited under habeas review, challenged the magistrate's jurisdiction to decide and order Petitioner's extraditability where there was no opportunity for Article III involvement at any turn of the litigation. Petitioner argued the magistrate lacked jurisdiction under the statute and the Constitution.[3]

In a sixteen-page decision denying the appeal, the Court of Appeals relied heavily upon 28 U.S.C. § 636(a)(1), a section of the Federal Magistrates Act stating that magistrates have jurisdiction over "all powers and duties conferred or imposed upon United States commissioners." App. at 8a, *citing In re Farez,* 8 F. Cas. 1007 (C.C.S.D.N.Y. 1870) (No. 4,645). The Appeals Court considered whether the Constitution and statutory scheme granted the magistrate jurisdiction over international extradition cases. It found no violation of the statute or Constitution, even though the magistrate decided Petitioner's case with no Article III involvement because "[e]xtradition magistrates do not exercise powers traditionally

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charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez,* 268 U.S. at 312.

[3] Petitioner also argued: (1) probable cause was lacking because the provisional warrant and complaint contained no words whatsoever establishing probable cause, and no subsequent warrant or complaint was issued; and (2) 18 U.S.C. § 3190 did not apply because Petitioner did not "escape" from the United Kingdom. The Second Circuit found the evidence against Petitioner "less than overwhelming." App. at 14a.

'reserved to Article III courts.'" App. at 10a. The Second Circuit, relying on the district court's powers to appoint and remove magistrates and to promulgate local rules, determined "the integrity of the judicial branch" was "adequately safeguarded." App. at 12a.

Petitioner subsequently filed a petition for rehearing and suggestion for rehearing in banc which was denied without opinion.

B. Constitutional and Statutory Framework

Article III provides that an Article III Judge shall decide:

> all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made.

U.S. Const. art. III, § 2. For more than two centuries, lacking a clear definition of the constitutional boundaries of non-Article III jurisdiction, lower courts have inconsistently administered international extradition cases. In some cases a non-Article III adjudicator decides extraditability[4] and in others an Article III Judge.[5] Sometimes within the same district, extradition cases are administered inconsistently.[6]

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[4] *See, e.g., Rice v. Ames*, 180 U.S. 371 (1901) (magistrate in the Northern District of Illinois); *Hill v. United States*, 737 F.2d 950 (11th Cir. 1984) (magistrate in Southern District of Florida); *Esposito v. Adams*, 700 F. Supp. 1470 (N.D. Ill. 1988) (magistrate in Northern District of Illinois).

[5] *Collins v. Miller*, 252 U.S. 364 (1920) (Judge in Eastern District of Louisiana; *Charlton v. Kelly*, 229 U.S. 447 (1913) (Judge in New Jersey); *David v. Attorney Gen. of the United States*, 699 F.2d 411 (7th Cir.) (Judge in Southern District of Illinois), *cert. denied*, 464 U.S. 832 (1983); *In re Prushinowski*, 574 F. Supp. 1439 (E.D.N.C. 1983) (Judge in Eastern District of North Carolina).

[6] *Compare In re McMullen*, 989 F.2d 603 (2d Cir.) (Judge in Southern District of New York), *cert. denied sub nom. McMullen v. United States*, —— U.S. ——, 114 S. Ct. 301 (1993) *with In re Mackin*, 668 F.2d 122 (2d Cir. 1981) (magistrate in Southern Dis-

Only limited jurisdiction has been delegated to magistrates, adjuncts of the Federal Courts. The Federal Magistrates Act, 28 U.S.C. §§ 631-639, confers upon magistrates subject-matter jurisdiction over the following:

- duties conferred upon United States commissioners by statute or Criminal Rule, duties under 18 U.S.C. §§ 3142 and 3401, and power to sentence for misdemeanors [7];
- certain pretrial matters designated by a Judge [8];
- hearings, including evidentiary hearings designated by a Judge [9];
- additional duties consistent with the Constitution [10]; and
- certain emergency proceedings.[11]

The other critical statute is the Extradition Act, 18 U.S.C. §§ 3181-3196, specifically Section 3184 (Fugitives from foreign country to United States), which requires that a magistrate be "authorized" to conduct an international extradition case.[12] It provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign gov-

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trict of New York). *See also Hooker v. Klein*, 573 F.2d 1360, 1364 (9th Cir. 1978) (first extradition request assigned to magistrate, who denied it; second request assigned to Judge).

[7] 28 U.S.C. § 636(a).

[8] 28 U.S.C. § 636(b)(1)(A).

[9] 28 U.S.C. § 636(b)(1)(B).

[10] 28 U.S.C. § 636(b)(3).

[11] 28 U.S.C. § 636(f).

[12] *See* 1 M. Cherif Bassiouni, "Introduction to the Relationship between the Executive, Legislative and Judicial Branches" and "History of Extradition as Part of the Foreign Relations of the United States," *International Extradition: United States Law and Practice*, ch. II §§ 1-2, at 39-55 (2d rev. ed. 1987) (hereinafter Bassiouni) (an encyclopedic review of international extradition in the United States).

> ernment, any justice or judge of the United States, or *any magistrate authorized so to do by a court of the United States*, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. . . .

18 U.S.C. § 3184 (emphasis added). The statute does *not* confer subject-matter jurisdiction upon magistrates. Rather, Section 3184 restricts the magistrates who can conduct an international extradition case to those who have been specifically "authorized" and received jurisdiction from an Article III Court.

Magistrate jurisdiction[13] over international extradition has been a recurring issue before Article III Courts since 1799, *United States v. Robins*,[14] 27 F. Cas. 825 (D.C.S.C. 1799) (No. 16,175) (full ninety-page opinion available on Westlaw), and before this Court since 1852, where the issue of commissioner/magistrate jurisdiction over the proceedings was first raised, *In re Kaine*, 55 U.S. (14 How.)

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[13] The role now held by magistrate judges was held by United States Commissioners until 1968. 28 U.S.C. § 636 (Historical notes). *See Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (commissioners have limited jurisdiction over "preparatory and preliminary" matters) and *Holiday v. Johnston*, 313 U.S. 342 (1941) (commissioner lacked jurisdiction to preside over habeas corpus case). "Commissioners . . . often were not lawyers." *Gomez v. United States*, 490 U.S. 858, 865 (1989).

[14] The name is spelled inconsistently in court records as "Robins" or "Robbins." *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990) (hereinafter Wedgwood) (reviews historical records and analyzes political history).

103 (1852), *on remand, Ex parte Kaine*, 14 F. Cas. 78 (C.C.S.D.N.Y. 1853) (No. 7,597) (Nelson, J., on circuit). International extradition requests likely will increase, corresponding to the expanding definition of economic crimes and the adoption of this concept by our Treaty partners. The Court has not yet spoken to these constitutional or statutory issues.[15]

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to define the jurisdiction of magistrates and to safeguard the role of the Article III Judiciary. Three compelling reasons call for the Court to grant review of this case: (1) The decision raises unsettled fundamental constitutional issues impinging upon the independent Judiciary, the Separation of Powers and the Petitioner's liberty and Due Process interests; (2) Apart from any constitutional issue, the case presents a substantial issue of whether the statutory framework requires Article III involvement; and (3) The case presents recurring issues regarding the limits of magistrate jurisdiction and the lower courts' inconsistent administration of international extradition cases.

Petitioner's case presents a unique opportunity for the Court to draw the lines of the constitutional and statutory boundaries of magistrate jurisdiction where:

- Petitioner gave no consent;
- The district court made no reference of assignment; and
- The Article III Judiciary had no involvement.

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[15] Two terms ago, a case filed with the Court presented the issue of magistrate jurisdiction in international extradition proceedings, but the parties settled and voluntarily dismissed the petition for certiorari. *See Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990), *cert. dismissed sub nom. Ward v. Attridge*, 501 U.S. ——, 111 S. Ct. 2844 (1991).

Magistrates themselves have questioned the scope of their jurisdiction. *See* Magistrate Judges Division of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 251-53 (1993) (considering constitutional issues regarding the boundaries of magistrate jurisdiction). *See also* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916 (1988) (addressing concerns over non-Article III jurisdiction).

Self-executing commissioner and magistrate jurisdiction of international extradition is an anomaly of an obsolete time. Historically, administration of the early extradition cases depended upon which adjudicator, an Article III Judge or a commissioner, first reached the alien fugitive in the remote frontier lands.[16] That need long-ago vanished once the remote territories were settled and modern transportation developed. The historical record of inconsistent administration of international extradition proceedings does not validate the constitutionality of a magistrate's deciding and certifying the extradition of a United States citizen to a foreign country.[17]

In the Supreme Court's first international extradition case, four of the seven sitting Justices (three in dissent and one concurring) agreed that the commissioner[18] lacked jurisdiction to issue the final order of extraditabil-

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[16] The congressional intent for commissioners to conduct proceedings arose from the remoteness of the territories and difficult travel. *Cong. Globe*, 30th Cong., 1st Sess. 868 (1848); *see also In re Mackin*, 668 F.2d at 126.

[17] The historical record, in fact, highlights the "inconsistencies," "disparities" and "significant defects" in the functions of commissioners. H. Rep. No. 1629, 90th Cong., 2d Sess. 1-4 (1968), *reprinted in* U.S.C.C.A.N. 4252-56.

[18] Magistrate judges now serve in the role once held by United States commissioners. *See* 28 U.S.C. § 636, Revision Notes.

ity. *In re Kaine*, 55 U.S. (14 How.) at 142.[19] A commissioner could not "exercise . . . so high and delicate a power over the rights and liberty of the citizen." *Id.* (Nelson, J., dissenting opinion).

This Court should grant certiorari to establish the limits of magistrate jurisdiction and to guide lower court administration of this international extradition case. The case presents recurring issues of constitutional and statutory importance, especially ripe for consideration in light of the Court's recent efforts to establish the boundaries of non-Article III jurisdiction.[20]

I. THIS COURT SHOULD RESOLVE WHETHER A MAGISTRATE'S EXERCISE OF JURISDICTION IN ISSUING THE FINAL AND NONREVIEWABLE DECISION TO EXTRADITE A UNITED STATES CITIZEN VIOLATES ARTICLE III OF THE UNITED STATES CONSTITUTION, WHERE THERE WAS NO CONSENT AND WHERE THE ARTICLE III JUDICIARY ABDICATED ITS DUTIES TO ASSIGN, SUPERVISE, AND REVIEW THE CASE

This case challenges the extent to which the role of non-Article III adjudicators may intrude upon the tripartite system reserved to the Executive, Legislative and Judicial Branches. In this case, a non-Article III adjudicator exercised unfettered jurisdiction to decide the extraditability of Petitioner, a United States citizen, to a foreign country. No Article III Judge was involved in the decision and no Article III review was possible.

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[19] The majority dismissed the case, holding the Court lacked jurisdiction to review a commissioner's final order. *In re Kaine*, 55 U.S. (14 How.) at 103.

[20] *See Peretz*, 501 U.S. ——, 111 S. Ct. at 2661; *Gomez*, 490 U.S. at 858; *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); and *Raddatz*, 447 U.S. at 667.

A. The Court Has Never Determined The Constitutionality of A Magistrate's Deciding the Ultimate Matter in An International Extradition Case

This Court has never determined the extent to which the essential attributes of Article III and the fundamental structures of Separation of Powers allow delegation to a non-Article III adjudicator of a foreign nation's request for the extradition of a United States citizen. Magistrates recently identified this constitutional issue as unsettled before this Court. *See A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. at 252-53 n.5.

In Petitioner's case, the Clerk of the district court ministerially and automatically assigned the complaint for international extradition to a magistrate, pursuant to Local Rule 9.[21] All proceedings in Petitioner's extradition case were conducted by magistrates.[22] No Article III Judge reviewed the case or the appropriateness of the assignment. No Article III Judge was assigned the case for supervision or review of the magistrate's final decision.[23] No opportunity existed to request an Article III Judge or to challenge the magistrate assignment. A magistrate ordered Petitioner's extraditability—a final, dispositive order, which is not reviewable on direct appeal. *Collins v. Miller*, 252 U.S. 364, 369 (1920).

The only method to challenge the magistrate's dispositive decision of this United States citizen's extraditability

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[21] Local Rule 9 reads: "Pursuant to 18 U.S.C. § 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein." The local rule may be read to permit specific authorization consistent with Petitioner's argument here; therefore, it is unconstitutional only as applied.

[22] Three different magistrates presided seriatim over different proceedings in Petitioner's case.

[23] The magistrates decided issues based on Petitioner's Fourth and Fifth Amendment rights, including the sufficiency of the complaint and affidavit and whether there was probable cause to expel Petitioner from the country of his citizenship.

is the limited and collateral examination habeas corpus provides. *Id.*; *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1402 (9th Cir. 1988). Hence, Petitioner pursued the only avenue available to challenge the magistrate's order and filed a petition for habeas corpus relief.

B. A Trilogy of This Court's Decisions Addresses the Boundaries of Non-Article III Jurisdiction

In a trilogy of cases, this Court recently has considered the constitutionality of non-Article III jurisdiction and the boundaries of Article III "structural protections." *See Peretz v. United States*, 501 U.S. ——, 111 S. Ct. 2661 (1991); *Gomez v. United States*, 490 U.S. 858 (1989); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). These structural protections[24] safeguard and maintain an "independent judiciary within the constitutional scheme of tripartite government." *Schor*, 478 U.S. at 847-48.

In reviewing Article III challenges, the Court has employed a pragmatic, flexible approach rather than a formalistic one. *Schor*, 478 U.S. at 851-52. In *Schor*, the Court reviewed a quasi-judicial authority empowered to decide common law claims arising out of commodities trade. The Court applied a structural analysis to determine the permissible scope of non-Article III jurisdiction, weighing the following three factors:

(1) "[T]he extent to which the 'essential attributes of judicial power' are reserved to Article III

[24] In addition to the structural precepts, Article III also safeguards personal interests. *Schor*, 478 U.S. at 848. Petitioner is not arguing his personal rights under the Fourth and Fifth Amendments. Those personal interests come into play, however, in considering whether the rights decided by the non-Article III tribunal are of such import that they go to the heart of Article III's essential attributes and raise structural concerns. *See id.* at 851 (discussing factors to be considered when deciding the constitutional validity of non-Article III adjudication).

courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts";

(2) "[T]he origins and importance of the right to be adjudicated"; and

(3) "[T]he concerns that drove Congress to depart from the requirement of Article III."

Id. The majority cautioned that structural concerns would be implicated where Congress created non-Article III tribunals to decide the "entire business of the Article III courts without any Article III supervision and without evidence of valid and specific legislative necessities." *Id.* at 856.

In *Gomez*, a unanimous Court applied those three factors to examine the delegation to a magistrate of felony voir dire. *Gomez*, 490 U.S. at 860. The Court addressed the constitutional question implicated [25] but based its holding on statutory grounds, applying its policy to avoid constitutional issues where possible. *Id.* at 864, 872 n.25. Under the statutory analysis, the Court held a magistrate could not assume voir dire of felony juries over a defendant's objection. *Id.* at 876.

In its most recent decision involving Article III and magistrate jurisdiction, the Court employed both a constitutional and a statutory analysis. *Peretz*, 501 U.S. at ——, 111 S. Ct. at 2661. Again, the Court was presented with the question of a magistrate's authority to

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[25] The Court's opinion turned on its reading of the Federal Magistrate Act "additional duties clause," as construed within the constraints of Article III. *Gomez*, 490 U.S. at 860-872. The Court upheld the constitutionality of delegating felony voir dire to a magistrate where there was consent or waiver, but noted that any additional duties assigned a magistrate must "bear some relationship to the specified duties" in the Act. *Id.* at 864.

conduct felony voir dire, but where the party expressly and repeatedly consented. The Court found that where the party consented the delegation was permissible under the Federal Magistrates Act. *Id.* 501 U.S. at ——, 111 S. Ct. at 2666-67. The Court applied both a personal and a structural analysis. By expressly consenting, Peretz waived any *personal* right to an Article III Judge.

For the *structural* analysis, the Court found no infringement upon Article III "structural protections," because the trial court, through its procedures, maintained "total control and jurisdiction," a situation not present in Petitioner's case. *See id.*, 501 U.S. at ——, 111 S. Ct. at 2669-70, *citing Raddatz*, 447 U.S. at 681.

The Court relied on the following factors to decide whether the structural protections satisfied Article III requirements:

(1) the Article III Court decides whether to assign a matter to the magistrate;

(2) the Article III Court decides whether to accept or adopt the work performed by the magistrate; and

(3) "[m]agistrates are appointed and subject to removal by Article III judges."

Id.

Two of the above three factors are not satisfied in Petitioner's case. Although the magistrate here was appointed by the Article III court and is subject to removal, no Judge in this case had (nor practically could have had) any involvement even to know of the magistrate's decision. This case affects the essence of Article III jurisdiction, yet meaningful Article III review is completely absent.

C. The Decision Below Is Contrary to This Court's Prior Holdings and Violates Article III

The Court of Appeals decision is irreconcilable with previous holdings of this Court: *Peretz, Schor, Gomez,* and a case from the turn of the century, *Ng Fung Ho v. White,* 259 U.S. 276 (1922).

In *Ng Fung,* this Court overturned the historical practice of a commissioner exercising jurisdiction to deport an alleged alien claiming citizenship. The Court held the structural protection of an Article III adjudication was required because of the Due Process concerns implicated. *Ng Fung,* 259 U.S. at 284-85.

Prior to the holding in *Ng Fung,* commissioners exercised comparable jurisdiction in deportation and international extradition cases. Like deportation, international extradition implicates serious constitutional issues: Article III, Separation of Powers and personal constitutional interests. *In re Mackin,* 668 F.2d at 130. Allowing magistrates to conduct and decide international extradition cases with no Article III assignment, supervision or review is analogous to commissioners' deciding deportation cases, an unconstitutional practice that this Court prohibited. Article III structural safeguards require that the *Ng Fung* ruling be applied to the extradition of United States citizens.

More recent opinions of magistrate jurisdiction confirm such jurisdiction is limited. See *Peretz, Schor* and *Gomez,* discussed below.

Petitioner's case embodies the very structural concerns that this Court consistently has cautioned would impermissibly intrude upon Article III power and independence. *Peretz,* 501 U.S. at ——, 111 S. Ct. at 2669-71; *Schor,* 478 U.S. at 856; *Raddatz,* 447 U.S. at 683. The "entire business" of this international extradition case has been given the magistrate "without any Article III supervision and without evidence of valid and specific legislative

necessities." *Schor*, 478 U.S. at 855. The magistrate performed duties that cannot conceivably be considered "subsidiary," *Gomez*, 490 U.S. at 870, and impermissibly breached into the boundaries of subject-matter reserved to the Article III Judiciary.[26]

It matters not whether the impermissible delegation results from the trial court's unlawful abdication or Congress's unlawful delegation. "[T]he Constitution guarantees not merely that no Branch will be forced by one of the *other* Branches to let someone exercise its assigned powers—but that none of the Branches will *itself* alienate its assigned powers." *Peretz*, 501 U.S. ——, 111 S. Ct. at 2680 (Scalia, J., dissenting) (emphasis in original).

Application of the three *Schor* factors to Petitioner's case argues forcefully for invalidating this judicial abdication:

(1) The extent to which "essential attributes" of Judicial Power are reserved to Article III Courts:

> **Here, none are so reserved—the non-Article III tribunal makes the ultimate adjudicatory determination of all constitutional rights at issue.**

(2) The "origins and importance of the right to be adjudicated":

> **Here, there are fundamental and important constitutional rights such as Fourth Amendment probable cause to decide whether a crime has been committed and Fifth Amendment Due Process.**

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[26] Numerous authors have addressed the controversy over the permissible scope of non-Article III adjudication. *See, e.g., Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. at 247; Fallon, 101 Harv. L. Rev. at 933-79 (especially pp. 976-79, addressing need for an Article III Judge to review questions of law); Judith Resnik, *Failing Faith*, 53 U. Chi. L. Rev. 494, 524-25 (1986) (discussing the expanded role of non-Article III adjudication).

(3) The "concerns that drove Congress to depart from the requirement of Article III":

> **Whatever concerns once existed for Congress to encroach upon Article III and authorize commissioners/magistrates, vanished long-ago with the wild west and frontier land.**

To allow a magistrate to make the ultimate, nonreviewable decision [27] in an international extradition case conflicts with Article III and this Court's prior holdings. Consequently, the Court should grant certiorari, reverse the Court of Appeals opinion, and order an Article III Judge's involvement in deciding a foreign nation's request to extradite a United States citizen to a foreign country.

II. THIS COURT SHOULD RESOLVE WHETHER A MAGISTRATE'S FINAL AND NONREVIEWABLE DECISION TO EXTRADITE A UNITED STATES CITIZEN TO STAND TRIAL IN A FOREIGN COUNTRY WITH NO INVOLVEMENT OF THE ARTICLE III JUDICIARY VIOLATES 18 U.S.C. § 3184 AND 28 U.S.C. § 636.

This Court has never decided the extent to which the relevant statutory scheme permits a magistrate to exercise Article III jurisdiction in an international extradition case. The decision below construed 28 U.S.C. § 636(a)(1) as conferring upon magistrates unfettered jurisdiction, namely, to have ultimate adjudicatory determination over international extradition cases. *See* App. at 8a. The Court of Appeals, citing an 1870 decision from what is now the Second Circuit, App. at 8a, *citing In re Farez*, 8 F. Cas. at 1007, relied primarily upon its view that United States commissioners historically have conducted international extradition cases. However, the *Farez* court noted the parties had not argued the issue of commissioner jurisdiction. Nor does history validate the practice of

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[27] *Collins v. Miller*, 252 U.S. at 364 (discussing limited, collateral review habeas provides).

magistrates exercising complete, unfettered discretion in deciding international extradition cases. *Id.* at 1008.

A. The History of International Extradition Does Not Validate the Practice of Non-Article III Ultimate Adjudication

1. *An Historical Perspective: 1795-1848*

The United States has faced the controversy of international extradition since the Republic's birth. See *United States v. Robins*, 27 F. Cas. at 825. Initially, "the Executive had unfettered discretion" in conducting foreign affairs. *Eain v. Wilkes*, 641 F.2d 504, 513 n.13 (7th Cir. 1981). *See* also 1 Bassiouni, ch. II "History of Extradition" § 2 at 41-55.

1795-1807

In 1795, the United States entered into its first treaty, the Jay Treaty, which provided for international extradition with Great Britain.[28] In 1798, Great Britain first sought extradition through the Executive branch pursuant to the Jay Treaty, requesting surrender of several mutineers from the British frigate, the *Hermione*. President John Adams refused.[29] Britain again sought extradition of additional mutineers, but this time forwarded its request to the federal court. After a federal trial, the men were acquitted.

President Adams finally relented to a third extradition request directed to him by Great Britain in a case related to the *Hermione* mutiny. President Adams' Secretary of State directed the United States district judge to surrender the defendant to Great Britain upon production of sufficient evidence of criminality as would justify holding him for trial. *United States v. Robins*, 27 F. Cas. at 825.

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[28] 8 Stat. 116.

[29] *See* David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279, 304-06 (1992) (hereinafter Engdahl).

Robins claimed American citizenship to no avail because the court examined only whether there was probable cause. Britain tried, convicted and hanged Robins.

A public outcry ensued over the surrender of one claiming American citizenship, with no examination of the citizenship claim.[30] This outrage resulted, to a large measure, in President Adams' failed re-election bid. *See* 1 Bassiouni, at 4. The public, primarily the Republicans, regarded Adams' extradition request to the district court as an interference in judicial independence and, thus, an infringement on the Constitution. Engdahl, 42 Duke L.J. at 309. Members of Congress unsuccessfully attempted to censure President Adams for his actions in the *United States v. Robins* case. Engdahl, 42 Duke L.J. at 309-14; Wedgwood, 100 Yale L.J. at 354-59. Understandably, no further requests were made for extradition for the next two political generations, approximately the next forty years.

1807-1840

The Jay Treaty's extradition provision lapsed in 1807 and was not renewed.[31] In a few cases, state governments authorized international extradition certification. In 1840, this Court considered whether a state could surrender fugitives to foreign nations. The seven-member Court split on the issue, four holding in favor of such state authority while four other justices held that only the federal government could surrender such fugitives.[32] Subsequently,

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[30] The Court ruled that the law of the treaty was supreme and that Article III expressly provides that judicial power extends to treaties. After hearing and presentation of a British warrant and supporting affidavits, the Court ordered Robins turned over to the British. *United States v. Robins*, 27 F. Cas. at 825 (ninety-page opinion *published on* Westlaw.)

[31] Wedgwood, 100 Yale L.J. at 361.

[32] *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

the matter was decided in favor of exclusive federal jurisdiction.[33]

1842-1847

After the 40-year lapse in United States extradition law, the United States once again adopted an international extradition provision with Great Britain. In the Webster-Ashburton Treaty, the parties sought to avoid the *United States v. Robins* problems and therefore expressly provided for the Judiciary to decide in the first instance whether the accused should be surrendered. Under the Treaty, Judges and commissioners were authorized to issue arrest warrants for persons named in extradition requests and to decide the extraditability of those accused.[34] The Treaty required the judicial authority to decide whether there was sufficient evidence to commit the accused for trial and, if so, to refer the matter to the Executive branch for its final decision on whether to issue a surrender warrant.

In 1844, the United States entered into a similar extradition treaty with France. Subsequent bilateral treaties included extradition provisions.

2. *The International Extradition Statute, First Enacted in 1848, Permits Magistrates to Hear Extradition Cases Only If "Authorized So To Do"*

In 1848, Congress enacted the first piece of legislation to deal with extradition. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. The legislative history demonstrates some

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[33] In 1886, the Court held the Constitution reserved to the federal government the authority to surrender a fugitive to a foreign country. *United States v. Rauscher*, 119 U.S. 407, 414 (1886), (following Chief Justice Taney's opinion in the *Holmes v. Jennison* case).

[34] Presumably, the term "magistrates," as used in the Treaty, was the nomenclature for certain British authorities.

Members' concerns about whether a United States citizen could be extradited. *Cong. Globe,* 30th Cong., 1st Sess. 1008 (1848). The debate in the House of Representatives highlighted the need for extradition legislation due to fugitive "foreigners" who slip over our uncontrolled frontier boundaries. *Cong. Globe,* 30th Cong., 1st Sess. 868 (1848).

The enacted legislation provides that a federal Judge, or a "commissioner, **authorized so to do** by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may upon complaint made under oath" issue a warrant for arrest of the requested person so evidence of criminality may be heard and considered. If the evidence is sufficient to sustain the charge, that finding is certified to the Secretary of State who is authorized to order extradition and surrender of the accused.

In 1847, the Judiciary considered the first case brought under the new statute. Cautious to avoid the error of President Adams, President Polk referred the request for extradition to a United States district judge for a full hearing. *See In re Metzger,* 46 U.S. (5 How.) 176, 188 (1847). The Supreme Court reviewed the case on a petition for habeas relief and determined that review of an extradition request *is* a matter for the Judiciary and the Executive Branch had acted "very properly." *Id.* at 188-89.

Ex Parte Kaine, 14 F. Cas. at 80, decided five years after the new legislation was enacted, held that a commissioner could not determine an extradition matter where he had not been specially appointed, consistent with the Act of 1848. The Supreme Court had previously reviewed and dismissed the case for lack of jurisdiction. *In re Kaine,* 55 U.S. (14 How.) at 103.

From the late 1840's to the present, extradition cases have continued to be decided by federal Judges or commissioners (later magistrates). Only in 1912, more than

sixty years after the legislation became effective, did this Court decide that United States citizens are not exempt from foreign extradition unless the treaty so provides. *Charlton v. Kelly*, 229 U.S. at 467.

The present statute remains substantively unchanged from the original.[35] In 1968, the term "magistrate" was substituted for "commissioner." [36]

B. The 1968 Federal Magistrates Act Remedied Defects in the Commissioner System

In its first session in 1793, Congress created the position of commissioner.[37] That original statute authorized a person "learned in the law" to take bail for appearance if necessary. *Id.* In 1812, Congress expanded the functions of commissioners to include hearing land claims and to provide compensation. Act of Feb. 20, 1812, 2 Stat. 672. Commissioners often were not lawyers or otherwise qualified for such service. *Gomez*, 490 U.S. at 865.

Commissioners' powers gradually increased. In 1817, Congress also authorized commissioners to take affidavits and to "exercise all the powers that a justice or judge of any of the courts of the United States may exercise [under Section 30 of An Act to Establish the Judicial Courts of the United States]." Act of Mar. 1, 1817, 3 Stat. 350. An 1842 act further expanded the commissioners' jurisdiction to include taking of depositions of

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[35] *See* Act of June 19, 1876, ch. 133, 19 Stat. 59; Rev. Stat. § 5270, Act June 6, 1900, ch. 793, 31 Stat. 656 (renumbered the provisions at 18 U.S.C. §§ 651, *et seq.*); 18 U.S.C. §§ 3184-3195, June 25, 1948, ch. 645, § 1, 62 Stat. 822 (renumbered and phrase changes). In 1873, the international extradition statutes were recodified at Sections 5270 through 5276 of the Revised Statutes. *See* Rev. Stat. §§ 5270-76 (1873). *See also* Act of Aug. 3, 1882; 18 U.S.C. §§ 3184, *et seq.*, June 25, 1948, ch. 645, § 1, 62 Stat. 822.

[36] Federal Magistrate Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, Title III, § 301(a)(3).

[37] An Act to Establish the Judicial Courts of the United States, Act of Mar. 2, 1793, 1 Stat. 334.

witnesses in civil matters and exercising "any power that any justice of the peace or other magistrate" could exercise "by arresting, imprisoning, or bailing the same." Act of Aug. 23, 1842, 5 Stat. 516.

In 1968, when Congress abolished the office of commissioner,[38] magistrates were given all "powers and duties previously conferred or imposed upon United States Commissioners by law. . . ." [39] Soon after enactment of the Federal Magistrates Act, controversies arose concerning the scope of magistrates power.[40] In response, Congress amended the Act to grant additional magistrate powers.[41] Notwithstanding the expansion of powers, wherever important rights are involved, magistrate authority requires Article III supervision and review, the opportunity for such supervision and review, or the consent of the parties.

C. The Present Statutory Scheme Does Not Permit a Magistrate to Make the Ultimate Adjudicatory Determination

A magistrate cannot act lawfully pursuant to long-standing federal court practice and local rule if that practice is "a departure from the plain mandate of the

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[38] Federal Magistrates Act, 28 U.S.C. § 636.

[39] The Congressional history supports Petitioner's argument that Section 636(a)(1) does not effectively confer jurisdiction upon magistrates to conduct and decide international extradition cases: "Many commissioners lack an understanding of the true nature of their statutory functions; there is great disparity from district to district on how even fundamental problems are handled, due in great measure to inadequate statutory guidelines and the lack of any effective administrative apparatus within the judiciary that is charged with assisting commissioners in the performance of their duties." H. Rep. No. 1629, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4261.

[40] *See Wingo v. Wedding*, 483 F.2d 1131, 1132 (5th Cir. 1973), *aff'd*, 418 U.S. 461 (1974).

[41] *See* H. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169.

statute." *Holiday v. Johnston*, 313 U.S. at 351 (holding Commissioners could not conduct habeas corpus proceedings under a local rule where the statute plainly required the proceedings before a judge); *see also Wingo*, 418 U.S. at 461.

1. *The Extradition Statute Confers No Jurisdiction Upon Magistrates, As the Plain Terms Require Special Authorization*

The Extradition Act does not grant jurisdiction to a magistrate for international extradition cases, unless the magistrate has been "authorized so to do." The plain terms of 18 U.S.C. § 3184, require that a magistrate be specially authorized to preside over an international extradition case. Section 3184 confers no jurisdiction upon magistrates. Rather, it directs that only a federal or state judge or "a magistrate authorized so to do" can preside over extradition matters.

Federal courts have interpreted Section 3184 to require a Judge's special authorization. *See Rice*, 180 U.S. at 378 ("the only qualification required of a commissioner to act in extradition cases is that suggested by Rev. Stat. § 5270, that he shall be 'authorized so to do by any of the courts of the United States' "); *Vaccaro v. Collier*, 38 F.2d 862, 867 (D. Md. 1930) ("jurisdiction in such cases must be expressly given to the commissioner . . . [as] expressly given by *order* of this court," emphasis added), *aff'd in part and rev'd in part*, 51 F.2d 17 (4th Cir. 1931); *Ex Parte Kaine*, 14 F. Cas. at 80. However, some courts, perhaps confused by the archaic language of those cases, have misconstrued or sidestepped the letter of the law.[42]

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[42] For example, the Second Circuit below mistakenly relied on *In re Adutt*, 55 F. 376 (C.C.D. Ill. 1893), to reject Petitioner's argument that the existence and sufficiency of a complaint and warrant go to subject-matter jurisdiction. In fact, close parsing of the decision reveals the *Adutt* court held to the contrary: "[t]he [petitioner's] fifth objection—that the complaint is defective as to

2. *The Magistrates Act Does Not Confer Powers on Magistrates to Conduct Extradition*

The Court of Appeals interpreted 28 U.S.C. § 636 (a)(1) to confer jurisdiction upon magistrates relying on the terms: "all powers and duties conferred or imposed **upon United States Commissioners by law."** (Emphasis added.) But, under that subsection, magistrates cannot receive jurisdiction greater than that previously conferred upon commissioners under the earlier version of Section 3184, which had identical language to the present text. Unless there was authorization "so to do," commissioners had no authority to hear and decide extradition cases. Section 3184 did not, by itself, confer subject-matter jurisdiction on commissioners; thus, magistrates cannot derive independent jurisdiction from 28 U.S.C. § 636(a)(1) to conduct international extradition cases. Rather the present Section 3184, just like the 1848 statute's identical terms, requires that an Article III Court confer special jurisdiction upon a magistrate, who has no subject-matter jurisdiction unless "authorized so to do." To read otherwise would leave meaningless the words "authorized so to do" in 18 U.S.C. § 3184.[43]

Not only is commissioner jurisdiction over international extradition cases not self-executing, but it also does not derive from any "historical" legal basis.[44]

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jurisdiction—cannot . . . be sustained." *Id.* at 378. "I am inclined to hold this complaint sufficient to give the commissioner jurisdiction, because it charges the crime of forgery." *Id.* at 379.

[43] A Court has confirmed that special authorization must be conferred. *See, e.g., Vaccaro v. Collier*, 38 F.2d at 867 ("jurisdiction in such cases must be expressly given to the commissioner . . . [as] expressly given by *order* of this court") (emphasis added).

[44] Remarks in the legislative history of the Federal Magistrates Act state: "Many commissioners lack an understanding of the true nature of their statutory functions; *there is great disparity from district to district on how even fundamental problems are handled, due in great measure to inadequate statutory guidelines.*" H. Rep. No. 1629, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252.

Section 636(a)(1) refers instead to other commissioner powers imposed by law, pursuant to existing statutes, such as the following, independently conferred "powers and duties" [45]; *as cited in Go-Bart*, 282 U.S. at 156 n.2; 28 U.S.C. § 758 (1926) (authorizes commissioners to take bail and affidavits); 28 U.S.C. § 392 (1926) (authorizes them to take oaths); and 28 U.S.C. § 393 (1926) (authorizes them to enforce determinations of foreign consuls). Each of these laws directly conferred jurisdiction upon commissioners.

3. *A Local Court Rule Does Not Validate An Unconstitutional Practice*

A local rule cannot confer upon a magistrate subject-matter jurisdiction exceeding that provided by statute. *See Wingo*, 418 U.S. at 472-73 (magistrates are not authorized by the statute to hear habeas corpus proceedings even where local rule so provides). This decision led to modifications in the Magistrates Act and additional magistrate powers. *Wingo* held that a local rule cannot provide jurisdiction greater than that granted by the statute.

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[45] 28 U.S.C. § 636(a)(1) confers upon magistrates jurisdiction over "all powers and duties" conferred by law upon commissioners. 18 U.S.C. § 3184 conferred no jurisdiction upon commissioners and, therefore, is not implicated in Section 636(a)(1).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1996—August Term, 1992

(Argued: July 14, 1993 Decided: September 21, 1993)

Docket No. 93-2308

MICHAEL AUSTIN,
Petitioner-Appellant,

—v.—

CHARLES HEALEY, United States Marshal
for the Eastern District of New York,
Respondent-Appellee.

Before:

MAHONEY, MCLAUGHLIN and JACOBS,
Circuit Judges.

VICTORIA TOENSING, Washington, DC (Joseph E. diGenova, Steven L. Zelinger, Suzanne M. Dohrer, Manatt, Phelps & Phillips, Washington, DC, of counsel), *for Petitioner-Appellant.*

CHARLES E. ROSE, Assistant United States Attorney, Eastern District of NY (Barbara Underwood, Chief Assistant United States Attorney, Eastern District of New York, Peter A. Norling, David C. James, Assistant United States Attorneys, of counsel), *for Respondent-Appellee.*

McLAUGHLIN, *Circuit Judge*:

Petitioner Michael Austin appeals from a judgment entered in the United States District Court for the Eastern District of New York (Edward R. Korman, *J.*) denying his petition for a writ of habeas corpus. By his petition, Austin sought review of the order of the extradition magistrate (Zachary M. Carter, *M.J.*) certifying his extraditability to the United Kingdom to face murder charges.

In this appeal, Austin's principal challenge is to the jurisdiction of the extradition magistrate. He attacks a local court rule that automatically assigns extradition proceedings to magistrate judges. Austin reads the extradition statute, 18 U.S.C. § 3184 (Supp. 1992), to require that an Article III judge *personally* assign a magistrate to a *particular* extradition matter, and thereafter retain supervisory authority over the case. Alternatively, he argues that the automatic designation of magistrates to conduct extradition proceedings violates Article III of the Constitution.

Finding no infirmity in the procedure of the district court, or in the proceedings below, we affirm.

BACKGROUND

On March 5, 1992, two unidentified assailants assassinated David George Wilson, a British accountant and commodities broker, in his garage in Lancashire, England. According to British authorities, Wilson's murder stemmed from his involvement with Austin and others in an international investment fraud scheme. At the extradition hearing, the government provided the following account of the events leading up to the British government's request for Austin's extradition.

Posing as a Mexican Army colonel, Austin represented that he had influence with the Mexican government and had access to a large supply of Marlboro cigarettes manufactured in Mexico. Austin engaged Wilson to line up

European investors for the cigarettes, which were to be shipped from the United States. The investors were asked to open letters of credit in Austin's favor when the ship set sail for Europe. The cigarettes, however, never existed; Austin's plan was to have the ship scuttled while at sea and to abscond with the investors' money.

Repeated shipping delays made some investors suspicious and they asked the Dutch and British authorities to investigate Austin. Upon information provided by the Dutch, the British arrested Wilson and questioned him about his role in the scam. After he was released, Wilson admitted to Austin that he was cooperating with the police.

His plan unraveling, Austin decided that Wilson knew too much and had to be eliminated. By telephone and fax from his office in New York City, Austin arranged for extensive surveillance of Wilson in the days immediately preceding the killing. Austin also told other business associates that he intended to hire assassins to kill Wilson because Wilson owed him money and because Wilson was cooperating with the police. After Wilson's murder, Austin became a suspect in the murder investigation in England.

On April 1, 1992, the Magistrate's Court at Lancashire issued a warrant for Austin's arrest on the charge of conspiracy to murder Wilson.[1] Because Austin was still in the United States, the United Kingdom requested Austin's provisional arrest by diplomatic note to the State Department for purposes of extradition. On behalf of the British government, the United States Marshal filed a complaint in the Eastern District seeking Austin's provisional arrest.

Pursuant to an Eastern District local court rule, the matter of Austin's extradition was assigned directly to a

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[1] On August 27, 1992, the Magistrate's Court issued a second arrest warrant, adding the substantive crime of murder.

magistrate judge. *See* Rule 9 of the Rules for Magistrate Judges, United States District Courts for the Eastern and Southern Districts of New York ("Rule 9").[2] Based upon the Marshal's complaint, the diplomatic note and the British arrest warrant, Magistrate Judge A. Simon Chrein issued the provisional arrest warrant on April 3, 1992. Austin was then arrested in New York City on July 15, 1992.

The following January, an extradition hearing was conducted before Magistrate Judge Zachary W. Carter (the "extradition magistrate"). Relying primarily upon documents and affidavits from England, the extradition magistrate concluded that there was probable cause to believe Austin committed the crimes charged. Accordingly, in an order dated January 29, 1993, he certified Austin's extraditability to the United Kingdom.

On March 2, 1993, Austin filed the present petition for a writ of habeas corpus in the district court, challenging the order of extraditability. Austin argued that: (1) the admission of multiple layers of hearsay during the extradition hearing violated the Due Process Clause and the extradition treaty; (2) the evidence was insufficient to support a finding of probable cause; and (3) the extradition magistrate erred when he denied certain requests for discovery. Notably, Austin did not attack Rule 9. In a written decision, the district court rejected each of Austin's three contentions and denied Austin's petition.

Austin now appeals.

DISCUSSION

"Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial and pun-

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[2] Rule 9 provides: "Pursuant to 18 U.S.C. Sec. 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein."

ishment." *Restatement (Third) of the Foreign Relations Law of the United States* § 474, at 556-57 (1987). Extradition is primarily a function of the executive branch, and the judiciary has no greater role than that mandated by the Constitution, or granted to the judiciary by Congress. *See Martin v. Warden, Atlanta Pen.*, 993 F.2d 824, 828-29 (11th Cir. 1993).

Accordingly, on appeal from the denial of habeas corpus in extradition proceedings, the scope of our review is quite limited. We consider only: (1) whether the judicial officer who conducted the extradition proceedings had jurisdiction; (2) whether the offense charged is extraditable under the terms of the treaty; and (3) whether there was sufficient evidence to support the finding of probable cause to extradite. *See Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Ahmad v. Wigen*, 910 F.2d 1063, 1064 (2d Cir. 1990). Austin concedes that murder and conspiracy to murder are extraditable offenses under the treaty. Accordingly, we address only the magistrate's jurisdiction and the sufficiency of the evidence.

I. *Jurisdiction of the Extradition Magistrate*

Austin's primary argument on appeal is that the extradition magistrate lacked jurisdiction. In support of this position, Austin contends that: (1) Rule 9's automatic designation of magistrate judges to conduct extradition proceedings contravenes the relevant extradition statute, 18 U.S.C. § 3184; and (2) Rule 9's automatic designation violates Article III of the Constitution. Because he now believes that these too affect jurisdiction, he adds claims that: (3) the Marshal's complaint failed to adequately apprise Austin of the charges against him; and (4) there was no probable cause to support his provisional arrest.

At the outset, we emphasize that Austin raises his four "jurisdictional" arguments for the first time in this appeal, despite the general rule that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Because this

rule is one of prudence (and does not limit our jurisdiction), however, we retain considerable discretion to decide questions not raised initially in the district court. *See Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 56 (2d Cir. 1992).

We see no reason to depart from the general rule of forfeiture with respect to Austin's third argument that the complaint was inadequate and his fourth, that his provisional arrest was illegal. Although he stipples his briefs with references to "subject matter jurisdiction," neither claim affects the extradition court's jurisdiction, *see In re Adutt*, 55 F. 376, 379 (C.C. Ill. 1893) (defect in extradition complaint is "not a matter going to the jurisdiction of the [magistrate] to entertain the complaint"); *Sewell v. United States*, 406 F.2d 1289, 1292 (8th Cir. 1969) (challenge to arrest without probable cause was waivable defect going only to personal jurisdiction), which is conferred by section 3184 and Rule 9. *See In re Demjanjuk*, 603 F.Supp. 1468, 1469 (N.D. Ohio), *appeal dismissed*, 762 F.2d 1012 (6th Cir. 1985); *In re Extradition of Singh*, Nos. 87-6160G-01, 87-6161G-01, 1988 WL 151438 (D.N.J. Feb. 17, 1988). Accordingly, we decline to consider them at this late hour. *See Jhirad v. Ferrandina*, 536 F.2d 478, 486 (2d Cir.) ("Non-jurisdictional objections must, of course, be timely raised or they are waived."), *cert. denied*, 429 U.S. 833 (1976).

We distinguish, however, Austin's first and second contentions, his statutory and constitutional challenges. These claims raise purely legal issues, *see, e.g., Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992), the resolution of which may affect "the proper administration of judicial business." *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion). Moreover, because Austin's second claim, the constitutional argument, implicates the balance struck by our Constitution among the three branches of government, notions of forfeiture or waiver "cannot be dispositive."

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986). Accordingly, we will exercise our discretion to address these two questions, despite Austin's failure to raise them in the district court.

A. *Rule 9 and the Extradition Statute*

Austin argues that Rule 9's automatic relegation of extradition to a magistrate judge contravenes 18 U.S.C. § 3184. Section 3184 provides that magistrates may conduct extradition proceedings if "authorized so to do by a court of the United States." Austin reads this statutory langauge [3] to require a *specific* delegation of authority to a magistrate by a district judge for each extradition matter. Accordingly, Austin maintains, Rule 9's omnibus designation violates the statute. We find it incomprehensible that if a statute authorizes a court to delegate responsibility, it cannot do so as a corporate body (by rule) and must act only through individual judges on a case-by-case basis.

Austin directs our attention to the Federal Magistrates Act. Even though "extradition" is not expressly referred to in the Act, Austin posits that an extradition proceeding is a "hearing" authorized under section 636(b)(1)(B)

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[3] In relevant part, the statute reads:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.

18 U.S.C. § 3184.

of the Act. 28 U.S.C. § 636(b)(1)(B) (1988). That section, Austin continues, requires a special delegation of authority to a magistrate, and provides for *de novo* review by the district judge. We reject Austin's statutory argument for two reasons.

Section 3184 speaks of authorization by a "court." 28 U.S.C. § 636(b)(1)(B), by contrast, refers to designation by "a judge." Hence, on its face section 3184 does not support a requirement of special delegation. *See Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990) (by its "plain meaning," similar D.C. local court rule provided the "authoriz[ation]" contemplated by section 3184), *cert. dismissed*, 111 S. Ct. 2844 (1991). *Cf. Grin v. Shine*, 187 U.S. 181, 186 (1902) ("we are not bound to import words into [section 3184] which are not found there").

Nor does the Federal Megistrates Act support Austin's argument. Section 636(a) of that Act expressly bestows upon magistrates "all powers and duties conferred or imposed upon United States commissioners." 28 U.S.C. § 636(a). And, prior to the Act, extradition proceedings were conducted by commissioners. *See* Pub. L. No. 90-578, § 301(a), 82 Stat. 1108 (1968) (substituting "magistrate" for "commissioner" in section 3184). Historically, it was never required that a commissioner be appointed in a particular extradition case, so long as he was appointed "in all cases of extradition." *In re Farez*, 8 Fed. Cas. 1007, 1008 (C.C.S.D.N.Y. 1870) (No. 4645). *See* 1 John Bassett Moore, *Moore on Extradition* 448-49 (1891). This is not without significance. We find nothing in the Federal Magistrates Act that changed this longstanding convention.

B. *Article III*

Austin's next argument plunges us into the "constitutional quandary" that is Article III. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 112 (1982) (White, J., dissenting). Article III nourishes

two intersecting values in our constitutional system: first, it protects the institutional integrity of the judiciary by safeguarding its independence against encroachment by the political branches; second, it guarantees litigants the personal right to have their claims adjudicated by judges cloaked with that independence. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citations omitted).

Austin believes that section 3184, as implemented by Rule 9, both (1) infringes upon the institutional integrity of the judiciary, and (2) violates his personal right to adjudication before an Article III judge. According to Austin, "[t]he Constitution requires that a United States citizen who could be denied his liberty through extradition to a foreign country have his case heard by a judge imbued with the independent judicial power guaranteed by Article III." We do not agree that either the judiciary's institutional rights, or Austin's personal rights, are jeopardized when magistrates conduct extradition proceedings at the direction of an Article III court.

1. *Institutional Interests*

We reject the notion that judicial independence is compromised when extradition hearings are conducted by magistrates authorized by rule of court. "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring Congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts,' and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.' " *Schor*, 478 U.S. at 850 (brackets in *Schor*) (citations omitted). At the same time, however, we will not read Article III to "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Id.* at 851.

Accordingly, when we evaluate a congressional delegation of authority to a non-Article III officer, we eschew

"doctrinaire reliance on formal categories," *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985), and instead, weigh a number of competing factors with the goal of preserving the values embodied in Article III:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Schor, 478 U.S. at 851. Upon consideration of these factors, we conclude that a general authorization to magistrates of the authority to conduct extradition hearings does not violate Article III.

Extradition magistrates do not exercise powers traditionally "reserved to Article III courts." To the contrary, the function performed by the judicial officer in certifying extraditability has not historically been considered an exercise of the "judicial power of the United States" at all. *See In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993) ("an officer who presides over such a proceeding is not exercising 'any part of the judicial power of the United States' ") (quoting *In re Kaine*, 55 U.S. (14 How.) 103, 119 (1852) (Curtis, J., concurring)); *Ward*, 921 F.2d at 288 n.2 ("Extradition, akin to a preliminary hearing, does not implicate 'the essential attributes of judicial power' and it certainly has not normally been vested *only* in Article III courts.") (emphasis in original); *Martin*, 993 F.2d at 828 ("An extradition proceeding is not an ordinary Article III case or controversy.").

The judicial officer conducting an extradition hearing is said to act in a "non-institutional capacity by virtue of

a 'special authority,' " *Howard*, 996 F.2d at 1325 (quoting *In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847)), an authority that has been delegated to the judiciary by Congress in section 3184. *See Martin*, 993 F.2d at 828. The function of the judicial officer is simply to certify extraditability to the Secretary of State, who holds the ultimate power to extradite at his discretion. *See United States v. Doherty*, 786 F.2d 491, 499 n.10 (2d Cir. 1986). Indeed, as Judge Friendly explained in *In re Mackin*, 668 F.2d 122, 125-30 (2d Cir. 1981), orders certifying extraditability are non-appealable precisely because they do not emanate from constitutional courts.

Neither do we consider the "origins and importance" of extradition hearings to weigh in Austin's favor. We have repeatedly noted, for example, that an extradition hearing is not a criminal prosecution: the order of extraditability expresses no judgment on Austin's guilt or innocence. *See, e.g., Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980); *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). Rather, an extradition hearing is "of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused . . . to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him." *Benson v. McMahon*, 127 U.S. 457, 463 (1888).

Finally, a brief review of the "concerns that drove Congress" in 1848 to grant judges and magistrates (then commissioners) their current role in the extradition process demonstrates that Congress reacted, in part, to "the public clamor for judicial involvement in the extradition process." Jacques Semmelman, *Federal Courts, The Constitution, and the Role of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198, 1208 (1991). *See generally* 1 M. Cherif Bassiouni, *Interna-*

tional Extradition 51 (2d rev. ed. 1987) ("The 1848 Act was designed to limit executive power. . . . The underlying theory was that the judiciary should have the authority to review executive action so that fundamental individual liberty would not be improperly infringed."); *Mackin*, 668 F.2d at 134-35 (in which Judge Friendly chronicles how executive abuse of its nearly absolute discretion in extradition matters led Congress in 1848 to enact what is now section 3184). Thus, by section 3184, Congress interposed the judiciary between the executive and the individual.

The procedures challenged here adequately safeguard the integrity of the judicial branch. Magistrates are appointed and are subject to removal by Article III courts. 28 U.S.C. § 631(a) & (i) (1988). Section 3184 permits extradition proceedings by magistrates *only* after an Article III court has authorized them. 18 U.S.C. § 3184. Finally, and most significantly, Rule 9 was promulgated by Article III judges. Because the authority to designate magistrates to hear extradition matters remains exclusively *within* the judiciary, we see no potential for trespass by the executive: "Thus, the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without the judicial department." *United States v. Raddatz*, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring).

2. *Personal Rights*

We also reject Austin's claim that his personal rights under Article III were violated. Although the contours of such a right are vague, it has been described as the "right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980). Article III does not, however, "confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Schor*, 478 U.S. at 848. *See Palmore v. United States*, 411 U.S. 389, 407 (1973).

As our discussion makes clear, section 3184, coupled with Rule 9's authorization procedure, does not leave room for unwelcome intrusion by the political branches into the extradition process. Although we agree that "extradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty," *In re Kaine*, 55 U.S. (14 How.) 103, 112 (1852), embracing this sentiment does not require that we demand further safeguards to individual liberty than those already chosen by Congress and the judges of the Eastern District. *See* Samuel T. Spear, *The Law of Extradition* 270 (3rd ed. 1885).

In sum, we hold that Article III is not violated when a magistrate conducts extradition proceedings pursuant to Rule 9. *Accord Ward v. Rutherford*, 921 F.2d 286, 289 (D.C. Cir. 1990) (Article III not offended by section 3184 or local rule authorizing magistrates to conduct extradition proceedings).

II. *Sufficiency of the Evidence*

Finally, Austin renews the argument made to the district court (and properly preserved) that the evidence presented at his extradition hearing did not warrant the finding of extraditability. Austin argues that the evidence relied upon by the extradition magistrate was neither "reliable" nor "credible." He also faults the district court for failing to scrutinize the extradition magistrate's determination in this regard. Finally, Austin argues that the evidence was insufficient to support probable cause to believe that Austin was guilty of murder and conspiracy to murder. We find no merit to these contentions.[4]

Austin's challenge to the reliability and credibility of the evidence is misdirected. "The credibility of witnesses

[4] Austin also argues that documentary evidence was improperly admitted against him under the relevant statute. 28 U.S.C. § 3190. Because this non-jurisdictional argument is made for the first time on appeal, we decline to consider it. *See Jhirad*, 536 F.2d at 486.

and the weight to be accorded their testimony is solely within the province of the extraditing magistrate." *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). It is clear to us from the record of the proceedings, moreover, that the extradition magistrate did in fact make such a determination: "[W]hile those affidavits contain hearsay, there's a level of consistency among those affidavits that comes from several different quarters that the Court believes renders that information reliable." Transcript of Magistrate's Decision at 5. Habeas review in the district court is not an occasion to review such a determination. *See Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981) ("The scope of [habeas] review is limited and should not be converted into a de novo review of the evidence.").

Nor are we persuaded that the evidence was insufficient to support probable cause to extradite. No doubt, the evidence tying Austin to the shooting of Wilson is circumstantial, and less than overwhelming. However, the foreign government is not required to present its entire case in this country. *See Quinn*, 783 F.2d at 815. The evidence presented need only "support a reasonable belief that [Austin] was guilty of the crime[s] charged." *Ahmad*, 910 F.2d at 1066. We agree with the district court that the evidence presented to the magistrate sufficed for this limited purpose.

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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93 CV 910

MICHAEL AUSTIN,

—against— *Petitioner,*

CHARLES E. HEALEY, United States Marshal
for the Eastern District of New York,
Respondent.

CORRECTED MEMORANDUM AND ORDER

[Filed Apr. 20, 1993]

Korman, J.

Petitioner Michael Austin seeks a writ of habeas corpus to challenge his extradition to Great Britain in connection with the murder of David Wilson. Petitioner argues that the admission of multiple layers of hearsay during the determination of probable cause at the extradition hearing held before Magistrate Carter was contrary to the Due Process Clause and the terms of the extradition treaty with the United Kingdom. Petitioner also attacks the finding of probable cause, arguing that the evidence was insufficient with or without the challenged hearsay statements. In addition, petitioner argues that Magistrate Carter's denial of certain discovery sought by petitioner that would have "vitiated the probable cause determination" also violated the Due Process Clause. As set out below, none of these claims provides a basis for the relief petitioner seeks.

The British Treaty

Petitioner argues that portions of the statements of four witnesses recounting threats by Austin against Wilson

admitted in the extradition hearing were not competent evidence under the terms of the extradition treaty with the United Kingdom because they contained multiple layers of hearsay.

The Federal Rules of Evidence, which petitioner contends would bar the testimony at issue here, do not apply in extradition proceedings. Fed. R. Evid. 1101(d)(3). There is no blanket prohibition against the presentation of hearsay evidence in an extradition hearing. *Collins v. Loisel*, 259 U.S. 309, 317 (1922). Rather, the weight to be given hearsay evidence, provided it otherwise meets the requirements for admissibility, is committed to the discretion of the reviewing magistrate. *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); *Melia v. United States*, 667 F.2d 300, 302 (2d Cir. 1981).[1]

This is only logical; the elimination of "hearsay from extradition proceedings would run counter to one of the primary objectives of bilateral extradition treaties, namely, 'to obviate the necessity of confronting the accused with the witnesses against him . . . [requiring] the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty.'" *Zanazanian v. United States*, 729 F.2d 624, 626-27 (9th Cir. 1984), *citing Sakaguchi v. Kaulukukui*, 520 F.2d 726, 728 (9th Cir. 1975). *See also Melia v. United States*, 667 F.2d at 302 ("an extradition hearing

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[1] 18 U.S.C. § 3190, the statute governing evidence in an extradition hearing, states that:

> "Depositions . . . shall be received . . . if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that [they] are authenticated in the manner required."

Petitioner does not dispute in this proceeding that the affidavits admitted into evidence at the extradition hearing before the Magistrate met the requirements for admission set out in § 3190.

is not the occasion for an adjudication of guilt or innocence. Rather, its purpose is to determine whether there is reasonable ground to believe that the person whose extradition is sought is guilty, that is, whether there is sufficient evidence to justify extradition under the appropriate treaty") (citations omitted).

The terms of the extradition treaty currently in force between the United Kingdom and the United States do not prohibit the introduction of hearsay—or, for that matter, multiple hearsay—statements in an extradition hearing. Article VII, Paragraph 5 of that treaty states in relevant part that:

> "any deposition or statement or other evidence given on oath or affirmed . . . shall be received in evidence in any proceedings for extradition:
>
> (a) if it is authenticated . . . by being certified by a judge, magistrate or other competent authority of the requesting party. . .; and
>
> (b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom. . . ."

United States-United Kingdom Extradition Treaty, January 1, 1977, 28 U.S.T. 227.

While the extradition treaty stipulates that statements admitted into evidence be sworn, the treaty does not import a requirement that evidentiary materials meet the standards of the Federal Rules of Evidence relating to the exclusion of hearsay. Treaty extradition obligations are contractual and should be construed liberally in the interests of comity. *Factor v. Laubenheimer,* 290 U.S. 276, 293-94 (1933); *United States ex rel. Sakaguchi v. Kaulukukui,* 520 F.2d at 731. The treaty states that the witness statements should be "given under oath," and

not that such statements meet the requirements for admissibility at trial in a United States court. In fact, as recognized by petitioner in his papers submitted in the present proceeding, sworn affidavits, expressly permitted under the terms of the treaty, are themselves hearsay. There is thus no convincing way to connect the "oath" requirement in the treaty with a bar against hearsay testimony in the extradition proceeding.

Moreover, "oath" clauses in extradition treaties, including the ones in the current treaty with the United Kingdom and its predecessor, have not been interpreted as prohibiting either hearsay or "double hearsay" testimony. *See, e.g., Emami v. United States District Court for the Northern District of California,* 834 F.2d 1444, 1451 (9th Cir. 1987) (requirement in treaty with Germany that statements be under oath did not preclude admission of hearsay statements in sworn affidavit); *Quinn v. Robinson,* 783 F.2d 776, 815 (9th Cir. 1986) (treaty with United Kingdom did not preclude admissibility of double hearsay identification of police officer). Indeed, in *Collins v. Loisel, supra,* which dealt with the predecessor treaty with Great Britain, the Supreme Court held that the unsworn statements of absent witnesses could be acted upon by the committing magistrate—even though that treaty, like the present one, contained a requirement that statements admitted in extradition hearings be under oath. 259 U.S. at 317.

Magistrate Carter treated the testimony at issue here in the appropriate manner. He stated at the hearing that he would "examine each out of court statement and layer of out of court statement to determine whether or not there are any indicia of reliability that have been recognized." Based on his review of those statements, Magistrate Carter concluded that "while the affidavits contain hearsay, there's a level of consistency among those affidavits that come from several different quarters that the Court believes renders that information reliable."

Petitioner nonetheless takes the position that Magistrate Carter should have excluded the evidence at issue outright. According to petitioner, the treaty permits one level of sworn hearsay, but no more. He bases his argument on *United States v. Zanazanian*, 729 F.2d 624 (9th Cir. 1984), as well as on the history and purposes of the hearsay rule. However, not only does *Zanazanian* permit the introduction of "double hearsay" (in that case in the form of unsworn police reports relating to statements of unsworn suspects made to police implicating the petitioner), which the Court of Appeals there found to be reliable, but the challenged statements in the present case may fall within exceptions to the hearsay rule. And, although the *Zanazanian* court contrasted the Swedish treaty at issue there—which does not require that witness statements be sworn—with the British treaty, which does, the Court of Appeals for the Ninth Circuit did so in the context of a discussion of treaty admissibility requirements, not of the standards for determining the competence or reliability of particular evidence. Indeed, that same court has also held that a double hearsay identification of a photograph was admissible and competent evidence in an extradition hearing under the British treaty. *Quinn v. Robinson*, 783 F.2d at 815.

Petitioner also attempts to connect a bar against "multiple" hearsay contained in affidavits during an extradition hearing with the oath requirement in the treaty by citing the history and purposes of the hearsay rule. *See* Petitioner's Memorandum of Law at 21-22. This argument, too, is flawed. The Fourth Amendment provides that "no warrant shall issue, but upon probable cause, supported by oath or affirmation." Nevertheless, hearsay within hearsay may be included in affidavits considered in determining the existence of probable cause. *See, e.g., United States v. Wylie*, 705 F.2d 1388, 1390 (4th Cir. 1983); *United States v. Wilson*, 479 F.2d 936, 941 (7th Cir. 1973); *United States v. McCoy*, 478 F.2d 176, 179 (10th Cir.) ("[a]s concerns so called double hearsay . . .

when a magistrate receives an affidavit which contains hearsay on hearsay, he need not summarily reject this double hearsay information, but is rather called on to evaluate such information as well as all other information in the affidavit in order to determine whether the informant gathered his information in a reliable way and from reliable sources"), *cert. denied,* 414 U.S. 828 (1973).

Such hearsay may be considered because, as suggested by the quotation selected by petitioner, the policy underlying the rule that issues should not be "tried other than by oath," *see United States v. Costello,* 221 F.2d 668, 678 (2d Cir. 1955), is directed primarily to the reliability of testimony at trial, and the right to confront and cross-examine witnesses there. The same concerns do not attach with equal force to a probable cause determination in an extradition hearing, where the issue is not whether an individual may be held answerable for a crime, but rather whether he or she may be held for trial, and there is no right to confront or cross-examine witnesses. Instead, the standards for the admissibility and consideration of evidence are similar to "those applicable in preliminary examinations which take place every day in this country for the purpose of determining whether a case is made out which will justify the holding of the accused." *Benson v. McMahon,* 127 U.S. 457, 463 (1888); *Sidona v. Grant,* 619 F.2d 167, 175 (2d Cir. 1980).

> That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a non-adversary proceeding on hearsay and written testimony. . . The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable doubt or even a

> preponderance standard demands, and credibility determinations are seldom critical in deciding whether the evidence supports a reasonable belief in guilt.

Gerstein v. Pugh, 420 U.S. 103, 121 (1975). *See Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980). Accordingly, the critical issue before the Magistrate was whether the evidence before him was sufficient to establish probable cause that petitioner committed the crime for which the United Kingdom seeks to extradite him.

The Magistrate's Determination of Probable Cause

Petitioner also argues that the circumstantial evidence presented by the government provided insufficient grounds for the determination of probable cause. In particular, petitioner focuses on the Magistrate's alleged failure to consider all the other people who had a motive to kill Wilson and the "triple and quadruple" hearsay statements in the record.[2] In addition, petitioner argues that certain statements relating to threats against Wilson and the retention of a private investigator by Austin under the name "McMillan" to locate Wilson and provide surveillance photographs of him were intrinsically unreliable and lacked probative value.[3]

The scope of review of an extradition determination in a habeas corpus proceeding is limited. That review is confined to:

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[2] These statements are characterized by petitioner as triple or quadruple hearsay because petitioner counts the underlying, sworn statement of the affiant as hearsay.

[3] Petitioner also offers arguments relating to the supposedly "illogical" way the crime was committed, if it was Austin who committed it, since Wilson's daughter, who could also possibly have identified Austin, was present at Wilson's house at the time of the murder and was not herself killed. (This amounts to an argument that if Austin really knew what he was doing, he would have arranged to have two people killed rather than one—hardly a compelling theory).

> whether the judge who conducted the extradition hearing had jurisdiction to do so, whether the extradition court had jurisdiction, whether the alleged offense was covered by an extradition treaty, and whether the extradition judge was presented with evidence which warranted a finding that there was reasonable ground to believe that the accused was guilty.

Melia v. United States, 667 F.2d at 302; *Ahmad v. Wigen*, 910 F.2d 1063, 1064-65 (2d Cir. 1990). To establish the basis for extradition under 18 U.S.C. § 3184, evidence must be produced that is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *In re Atta*, 706 F. Supp. 1032, 1050 (E.D.N.Y. 1989), *aff'd sub nom Ahmad v. Wigen*, 910 F.2d 1063, 1066 ("[i]f the evidence would support a reasonable belief that Ahmad was guilty of the crime charged, it sufficed").[4]

The record of the extradition proceeding was made before Magistrate Carter. No new evidence was presented in this habeas corpus proceeding. Magistrate Carter's assessment of the evidence is set out at pp. 2-7 of the Transcript of Criminal Cause for Extradition Hearing held on January 29, 1993. I agree with him that the evidence

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[4] 18 U.S.C. § 3184 sets out the requirements for extradition:

> Whenever there is a treaty . . . for extradition . . . any . . . magistrate authorized so to do by a court of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such . . . magistrate, to the end that the evidence of criminality may be heard and considered . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same. . . .

presented during the proceeding provided a sufficient basis to order petitioner's extradition. In addition to the evidence of threats against David Wilson made by petitioner (including evidence the admissibility of which petitioner does not challenge), and evidence indicating that Austin knew Wilson was cooperating with the police, there is substantial evidence that links petitioner to the surveillance of David Wilson and his home conducted in the time period immediately preceding the murder.

Specifically, the affidavits relating to the surveillance during the days before the murder submitted by the government at the extradition hearing indicate that Austin contacted Peter Meese, a commodities broker, on February 20, 1992 and asked him to locate a private detective to trace Wilson. He told Meese to tell the detective to expect a telephone call from an American named "McMillan." Meese did so, contacting a detective named John Henry Nunn, and informing Austin. Austin later contacted Meese again and told him that he had found Wilson already, but had contacted Nunn and spoken with him anyway. Peter Meese Affidavit at pp. 219-222. According to Nunn, a person with an American accent calling himself "McMillan" contacted Nunn and spoke with him twice. John Henry Nunn Affidavit at pp. 260-261.

On February 24, 1992, June Hellewell, another private investigator, received a telephone call from a person identifying himself as "McMillan." "McMillan" provided Hellewel with Wilson's telephone and fax numbers and asked her to trace his address and to have someone take an associate to Wilson's residence. Hellewell found Wilson's address for "McMillan," and subcontracted the work of showing and photographing the residence to another private investigator, Paul La-Vey. June Hellewell Affidavit at pp. 262-266. "McMillan" contacted La-Vey and asked him to photograph the residence and take his associate "Paul Harris" to see it. On March 1, 1992, at "McMillan's" request, La-Vey photographed Wilson's resi-

dence. At the request of McMillan's "associate," who identified himself as "Paul Harris," he faxed the directions to Wilson's house to the fax number 0101 212 7503973. Paul La-Vey Affidavit at pp. 268-275; Hellewell Affidavit at p. 266; Exhibits 19, 23. Documentary and affidavit evidence indicates that this fax number, located in New York City, was used by Austin. Meese Affidavit at p. 219; Joseph Martin Worden Affidavit at pp. 534-537; Trevor Taylor Affidavit at pp. 549-550; Exhibits 35, 39, 44. La-Vey described "McMillan" as having an American accent, and his associate "Paul Harris" as having an English accent. La-Vey Affidavit at pp. 288-289.

"McMillan" again contacted La-Vey on March 1 and March 4 and asked for further photographs of Wilson and his residence. La-Vey Affidavit at pp. 275-278. La-Vey replied that he would do so, but that he required further payment. La-Vey did not hear from "McMillan" again. *Id.* at p. 288. Wilson was murdered on March 5.

The evidence introduced by the government is sufficient to support the finding of probable cause. The arguments raised by petitioner are more appropriately addressed at trial than during the habeas review of the determination of probable cause in an extradition hearing.

The Additional "Exculpatory" Discovery Sought by Petitioner

Petitioner claims that the failure of the government to turn over certain exculpatory materials amounted to a denial of due process. Specifically, petitioner seeks "all exculpatory evidence . . . including . . . any evidence indicating that individuals other than Hector Portillo may have had a motive to murder David Wilson or may have threatened Wilson, directly or indirectly." [5]

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[5] "Hector Moretta Portillo" was a pseudonym used by petitioner. For the purposes of this proceeding, petitioner Michael Austin does not contest that he used the name Hector Portillo. Petitioner's Memorandum of Law at 4, n.2.

Evidence presented by the party opposing extradition is admitted solely for the purpose of explaining, if possible, the evidence that has been presented to support the showing of probable cause. *Collins v. Loisel*, 259 U.S. at 316-17. A party against whom extradition is sought is not entitled as a matter of right to *Brady* materials, because *Brady* has no application in international extradition proceedings. *Merino v. United States Marshal*, 326 F.2d 5, 13 (9th Cir. 1963), *cert. denied*, 377 U.S. 872 (1964). Accordingly, the extent of discovery allowed in an extradition proceeding lies within the sound discretion of the Magistrate Judge. *Quinn v. Robinson*, 783 F.2d at 817 n.41.

The materials sought by petitioner were the subject of a previous motion by the petitioner to compel, resulting in a direction by the court that United States Attorney inquire of Great Britain whether there was any information concerning specific threats or any other type of conduct by anyone other than Austin that would indicate an intention to do David Wilson harm. The British prosecutor replied that he had no such information regarding any threats or specific acts directed against Wilson or the Wilson family, and that certain reports in the press, including one with respect to which the court requested information, were "wildly inaccurate."

Petitioner appears to have received substantially what he sought. Moreover, any materials not discovered would not have been admissible in the extradition hearing unless they were "explanatory" of the evidence presented by the United States Attorney. The failure to conduct an exhaustive investigation of all possible exculpatory information at petitioner's request and to turn such information over to petitioner does not entitle him to habeas corpus relief. *Cf. United States v. Williams*, —— U.S. ——, 112 S.Ct. 1735, 1744-45 (1992).

Petitioner's request for a writ of habeas corpus is therefore denied.

SO ORDERED

/s/ Edward R. Korman
EDWARD R. KORMAN
United States District Judge

Dated: Brooklyn, New York
April 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of November one thousand nine hundred and ninety three.

Docket Number: 93-2308

MICHAEL AUSTIN,
Petitioner-Appellant,

v.

CHARLES HEALEY, United States Marshal
for the Eastern District of New York,
Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by petitioner-appellant, pro se, Michael Austin.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH,
Clerk

By: /s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 92-0695M

IN THE MATTER OF THE EXTRADITION
OF MICHAEL AUSTIN, also known as
"Colonel Hector Moretta Portillo"

CERTIFICATION AND ORDER OF EXTRADITABILITY

Having held an extradition hearing on January 26, 1993, and after considering the evidence, the Memoranda of both counsel and the arguments of both counsel, this court finds and certifies to the Secretary of State as follows:

1. This court has jurisdiction to conduct extradition proceedings pursuant to Title 18, United States Code, Section 3184.

2. There is an Extradition Treaty between the United States of America and the United Kingdom, entered into force on January 21, 1977, Title 28, United States Code, Section 227; TIAS 8468. This Treaty was in full force and effect at all times relevant to this extradition matter.

3. This court has jurisdiction over MICHAEL AUSTIN, also known as "Colonel Hector Moretta Portillo."

4. MICHAEL AUSTIN, also known as "Colonel Hector Moretta Portillo," has been charged in the United Kingdom with the murder of and conspiracy to murder David Wilson, which murder occurred on or about March 5, 1992.

5. The above-specified crimes, alleged to have been committed in the United Kingdom, are enumerated within said Treaty.

6. The "Hector Portillo" sought by the United Kingdom and the person brought before this court, who has given his name as MICHAEL AUSTIN, are one and the same person.

7. There is probable cause to believe that MICHAEL AUSTIN, also known as "Colonel Hector Moretta Portillo" has committed the crimes charged.

8. The evidence before this court is sufficient to justify the committal of MICHAEL AUSTIN, also known as "Colonel Hector Moretta Portillo," for trial, on felony charges of murder and conspiracy to murder, had the offense with which he is accused been committed in any state within the United States.

9. The requirement of "double criminality" has been satisfied.

10. The pertinent text and statute of limitations for the crimes with which MICHAEL AUSTIN, also known as "Colonel Hector Moretta Portillo," has been charged are set forth in the documents prepared by the United Kingdom.

THEREFORE, I certify that I have found MICHAEL AUSTIN, also known as "Colonel Hector Moretta Portillo," extraditable to the United Kingdom, and by prior warrant have committed him to the custody of the United States Marshal for the Eastern District of New York pending the issuance of an Extradition Warrant by the United States Secretary of State.

I further order that this Certificate of Extraditability and Order of Commitment, together with a copy of all evidence presented in this case, including the formal extradition documents received in evidence, be forwarded to the Secretary of State by the Clerk of this Court.

Date: January 29, 1993
Brooklyn, New York

/s/ Zachary W. Carter
ZACHARY W. CARTER
United States Magistrate Judge
Eastern District of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of September, one thousand nine hundred and ninety-three.

PRESENT: HON. J. DANIEL MAHONEY,
HON. JOSEPH M. MCLAUGHLIN,
HON. DENNIS G. JACOBS,
Circuit Judges.

93-2308

MICHAEL AUSTIN,
Petitioner-Appellant,

-v.-

CHARLES HEALEY, United States Marshal
for the Eastern District of New York,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of the district court be and it hereby is affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Staff Attorney

Dated: November 18, 1993

CONSTITUTIONAL, TREATY, STATUTORY AND RULE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

* * *

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

28 U.S.T. 229; T.I.A.S. No. 8468

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland:

Desiring to make provision for the reciprocal extradition of offenders:

Have agreed as follows:

ARTICLE I

Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense within Article III, committed within the jurisdiction of the other Party.

ARTICLE II

(1) This Treaty shall apply:

(*a*) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and any territory for the international relations of which the United Kingdom is responsible and to which the Treaty shall have been extended by agreement between the Contracting Parties embodied in an Exchange of Notes; and

(*b*) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

(2) The application of this Treaty to any territory in respect of which extension has been made in accordance with paragraph (1) of this Article may be terminated by

either Contracting Party giving six months' written notice to the other through the diplomatic channel.

ARTICLE III

(1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offense, if:

(*a*) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;

(*b*) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraphs (1)(*a*) of Article II; and

(*c*) the offense constitutes a felony under the law of the United States of America.

(2) Extradition shall also be granted for any attempt or conspiracy to commit an offense within paragraph (1) of this Article if such attempt or conspiracy is one for which extradition may be granted under the laws of both Parties and is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty.

(3) Extradition shall also be granted for the offense of impeding the arrest or prosecution of a person who has committed an offense for which extradition may be granted under this Article and which is punishable under the laws of both Parties by imprisonment or other form of detention for a period of five years or more.

(4) A person convicted of and sentenced for an offense shall not be extradited therefor unless he was sentenced to imprisonment or other form of detention for a

period of four months or more, or, subject to the provisions of Article IV, to the death penalty.

ARTICLE IV

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

ARTICLE V

(1) Extradition shall not be granted if:

(*a*) the person sought would, if proceeded against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State; or

(*b*) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party; or

(*c*) (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or

(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.

(2) Extradition may be refused on any other ground which is specified by the law of the requested Party.

ARTICLE VI

If the person sought should be under examination or under punishment in the territory of the requested Party for any other offense, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE VII

(1) The request for extradition shall be made through the diplomatic channel, except as otherwise provided in Article XV.

(2) The request shall be accompanied by:

(*a*) a description of the person sought, his nationality, if known, and any other information which would help to establish his identity;

(*b*) a statement of the facts of the offense for which extradition is requested;

(*c*) the text, if any, of the law

(i) defining that offense;

(ii) prescribing the maximum punishment for that offense; and

(iii) imposing any time limit on the institution of proceedings for that offense;

and

(*d*) (i) where the requesting Party is the United Kingdom, a statement of the legal provisions which establish the extraditable character of the offense for which extradition is requested under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1)(*a*) of Article II;

(ii) where the requesting Party is the United States of America, a statement that the of-

fense for which extradition is requested, constitutes a felony under the law of the United States of America.

(3) If the request relates to an accused person, it must also be accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority in the territory of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offense had been committed in the territory of the requested Party, including evidence that the person requested is the person to whom the warrant of arrest refers.

(4) If the request relates to a convicted person, it must be accompanied by a certificate or the judgment of conviction imposed in the territory of the requesting Party and by evidence that the person requested is the person to whom the conviction refers and, if the person was sentenced, by evidence of the sentence imposed and a statement showing to what extent the sentence has not been carried out.

(5) The warrant of arrest, or the judicial document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition:

(*a*) if it is authenticated in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting Party; or in the case of a copy by being so certified to be a true copy of the original; and

(*b*) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom; and where the

requesting Party is the United States of America, by being sealed with the official seal of the Department of State for the Secretary of State; or

(*c*) if it is authenticated in such other manner as may be permitted by the law of the requested Party.

ARTICLE VIII

(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.

(2) A person arrested upon such an application shall be set at liberty upon the expiration of forty-five days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request is subsequently received.

ARTICLE IX

(1) Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

(2) If the requested Party requires additional evidence or information to enable a decision to be taken on the request for extradition, such evidence or information shall be submitted within such time as that Party shall require.

ARTICLE X

If the extradition of a person is requested concurrently by one of the Contracting Parties and by another State or States, either for the same offense or for different offenses, the requested Party shall make its decision in so far as its law allows, having regard to all the circumstances, including the provisions in this regard in any Agreements in force between the requested Party and the requesting States, the relative seriousness and place of commission of the offenses, the respective dates of the requests, the nationality of the person sought and the possibility of subsequent extradition to another State.

ARTICLE XI

(1) The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition.

(2) If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested Party within such time as may be required under the law of that Party, he may be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—

(*a*) until after he has returned to the territory of the requested Party; or

(*b*) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition.

ARTICLE XIII

When a request for extradition is granted, the requested Party shall, so far as its law allows and subject to such conditions as it may impose having regard to the rights of other claimants, furnish the requesting Party with all sums of money and other articles—

(*a*) which may serve as proof of the offense to which the request relates; or

(*b*) which may have been acquired by the person sought as a result of the offense and are in his possession.

ARTICLE XIV

(1) The requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition.

(2) Expenses relating to the transportation of a person sought shall be paid by the requesting Party. No pecuniary claim arising out of the arrest, detention, examination and surrender of a person sought under the provisions of this Treaty shall be made by the requested Party against the requesting Party.

ARTICLE XV

A request on the part of the Government of the United States of America for the extradition of an offender who

is found in any of the territories to which this Treaty has been extended in accordance with paragraph (1) of Article II may be made to the Governor or other competent authority of that territory, who may take the decision himself or refer the matter to the Government of the United Kingdom for their decision.

ARTICLE XVI

(1) This Treaty shall be ratified, and the instruments of ratification shall be exchanged at Washington as soon as possible. It shall come into force three months after the date of the exchange of instruments of ratification.[1]

(2) This Treaty shall apply to any offense listed in the annexed Schedule committed before or after this Treaty enters into force, provided that extradition shall not be granted for an offense committed before this Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

(3) On the entry into force of this Treaty the provisions of the Extradition Treaty of December 22, 1931[2] shall cease to have effect as between the United Kingdom and the United States of America.

(4) Either of the Contracting Parties may terminate this Treaty at any time by giving notice to the other through the diplomatic channel. In that event the Treaty shall cease to have effect six months after the receipt of the notice.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

Done in duplicate at London in the English language this 8th day of June, 1972.

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[1] Jan. 21, 1977.

[2] TS 849: 47 Stat. 2122.

For the Government of the United States of America:

/s/ W. H. Annenberg [3]

For the Government of the United Kingdom of Great Britain and Northern Ireland:

/s/ Anthony Kershaw [4]

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[3] W. H. Annenberg.

[4] Anthony Kershaw.

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON 8 JUNE 1972

Reprinted in *International Judicial Assistance*
Volume 5 (1990)

The Government of the United States of America and the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;

(e) an attempt to commit any of the foregoing offense or participation as an accomplice of a person who commits or attempts to commit such an offense.

ARTICLE 2

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:

(1) there is probable cause;

(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and

(3) the act upon which the request for extradition is based would constitute an offense for extradition is based would constitute an offense [sic] punishable under the laws of the United States.

Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:

(1) the person arrested or summoned to appear is the person sought;

(2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and

(3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists.

ARTICLE 3

(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for defenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process.

ARTICLE 4

Article VIII, paragraph (2) of the Extradition Treaty is amended to read as follows:

(2) A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of this person sought if a request for extradition is subsequently received.

ARTICLE 5

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

ARTICLE 6

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man and the territories for whose international relations the United Kingdom is responsible which are listed in the Annex to this Supplementary Treaty;

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

ARTICLE 7

The Supplementary Treaty shall be subject to ratification and the instruments of ratification shall be exchanged at London as soon as possible. It shall enter into force upon the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

ANNEX

Anguilla; Bermuda; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Falkland Island Dependencies; Gibraltar; Hong Kong; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St. Helena; St. Helena Dependencies; The Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus; and Turks and Caicos Islands.

EXTRADICTION ACT
18 U.S.C. §§ 3181-3196 (1992)

18 U.S.C. § 3184 (1992)

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

(As amended, Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7087, 102 Stat. 4409; Nov. 29, 1990, Pub.L. 101-647, Title XVI, § 1605, 104 Stat. 4843.)

18 U.S.C. § 3190 (1992)

§ 3190. Evidence on hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

(June 25, 1948, ch. 645, 62 Stat. 824.)

FEDERAL MAGISTRATES ACT

28 U.S.C. § 636 (1992)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section; and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved

party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the

record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate. The requirements set forth in subsec-

tions (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 361.

(As amended Oct 17, 1968, Pub.L. 90-578, Title I, § 101, 82 Stat. 1113; Mar. 1, 1972, Pub.L. 92-239, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, Pub.L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, Pub.L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, Pub.L. 96-82, § 2, 93 Stat. 643; Oct. 12, 1984, Pub.L. 98-473, Title II, § 208, 98 Stat. 1986; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402 (29)(B), 98 Stat. 3359; Nov. 14, 1986, Pub.L. 99-651, Title II, § 201(a)(2), 100 Stat. 3647; Nov. 15, 1988, Pub.L. 100-659, § 4(c), 102 Stat. 3918; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7322, 102 Stat. 4467; Nov. 19, 1988, Pub.L. 100-702, Title IV, § 404(b)(1), Title X, § 1014, 102 Stat. 4651, 4669; Dec. 1, 1990, Pub.L. 101-650, Title III, § 308(a), 104 Stat. 5112.)

UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JOINT RULES FOR

GENERAL, CIVIL, CRIMINAL, ADMIRALTY AND MAGISTRATE PROCEEDINGS

EFFECTIVE OCTOBER 26, 1983
7th printing—November 1991

Rule 9. Issuance of Warrants and Hearings

Pursuant to 18 U.S.C. Sec. 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein.

Supreme Court, U.S.
FILED
FEB 9 1994

No. 93-1242

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL AUSTIN, PETITIONER

v.

CHARLES E. HEALY, UNITED STATES MARSHAL, EASTERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a district court local rule authorizing magistrate judges to conduct extradition proceedings violates 18 U.S.C. 3184 or Article III of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1242

MICHAEL AUSTIN, PETITIONER

v.

CHARLES E. HEALY, UNITED STATES MARSHAL, EASTERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the denial of petitioner's application for a writ of habeas corpus, Pet. App. 1a-14a, is reported at 5 F.3d 598. The opinion of the district court denying petitioner's application for a writ of habeas corpus, Pet. App. 15a-26a, and the order of the magistrate judge certifying that petitioner is subject to extradition, Pet. App. 29a-31a, are unreported.

JURISDICTION

The judgment of the court of appeals was filed on September 21, 1993. A petition for rehearing was denied on November 5, 1993. Pet. App. 27a-28a. The petition for a writ of certiorari was filed on February 1, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves an extradition request for petitioner presented by the United Kingdom to the United States. A magistrate judge in the United States District Court for the Eastern District of New York certified that petitioner was subject to extradition under the applicable treaty. Pet. App. 29a-31a. Subsequently, the district court denied petitioner's application for a writ of habeas corpus, Pet. App. 15a-26a, and the court of appeals affirmed, Pet. App. 1a-14a.

1. The evidence presented at the extradition hearing established probable cause to believe that petitioner arranged the murder of David George Wilson, a British accountant, in Lancashire, England, on March 5, 1992, to prevent Wilson from implicating petitioner in a failed fraudulent scheme. Posing as a Mexican Army colonel, petitioner engaged Wilson to find investors for a proposal to import Mexican cigarettes into Europe. Wilson found investors for the cigarettes, and the investors opened letters of credit in petitioner's favor when the ships that were supposedly carrying the cigarettes left for Europe. In fact, the cigarettes did not exist; petitioner planned to scuttle the ships at sea and to abscond with the investors' money. Pet. App. 2a-3a.

When the ships that were supposed to be carrying the cigarettes did not arrive, Wilson investigated and learned of the scheme. A short time later, British authorities, alerted to the scheme, arrested Wilson. After agreeing to cooperate with authorities, Wilson was released. Wilson then informed petitioner that he was cooperating with the police. By telephone and telefax from his office in New York City, petitioner arranged surveil-

lance of Wilson in the days preceding the murder. Petitioner also told business associates that he intended to have Wilson murdered because Wilson owed him money and was cooperating with the authorities. Pet. App. 3a. On March 5, 1992, two unknown men broke into Wilson's home, bound and gagged his family, and shot Wilson in the head. Gov't C.A. Br. 8.

2. On April 1, 1992, the Magistrate's Court at Lancashire issued a warrant for petitioner's arrest on the charge of conspiracy to murder Wilson. By diplomatic note, the United Kingdom then requested petitioner's provisional arrest, and on April 3, 1992, a magistrate judge in the Eastern District of New York issued a provisional arrest warrant. Petitioner was arrested on July 15, 1992. On August 27, 1992, the Lancashire Magistrate's Court issued a second arrest warrant, charging petitioner with the substantive crime of murder. In September 1992, the United Kingdom formally requested petitioner's extradition. Pet. App. 3a-4a; Gov't C.A. Br. 3-4.

Pursuant to a local rule in the Eastern District of New York, the clerk of the court assigned petitioner's extradition to a magistrate judge. See Rule 9 of the Rules for Proceedings Before Magistrates, United States District Courts for the Southern and Eastern Districts of New York.[1] Petitioner did not object to the assignment of the magistrate or request that a district judge preside over his extradition hearing. On January 29, 1993, the magistrate judge found probable cause to believe that petitioner committed the crimes charged and

[1] Rule 9 provides as follows: "Pursuant to 18 USC Sec 3184 magistrates are empowered to issue warrants for the apprehension of persons and conduct hearings and consider the evidence in the extradition proceedings referred to therein."

certified petitioner's extraditability to the United Kingdom. Pet. App. 3a-4a, 29a-31a.

Petitioner then sought a writ of habeas corpus to block his extradition. The district court denied the petition. The court rejected petitioner's contentions that the magistrate judge erred in considering hearsay evidence; that the evidence was insufficient to support the magistrate judge's probable cause determination; and that the magistrate judge should have allowed petitioner further discovery to obtain evidence to oppose his extradition. Pet. App. 15a-26a. Petitioner did not challenge the referral of the extradition proceeding to a magistrate judge. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-14a. Initially, the court held that Rule 9's general authorization of magistrate judges to conduct extradition hearings did not violate 18 U.S.C. 3184, which empowers magistrate judges to conduct extradition hearings when "authorized so to do by a court of the United States." The court found it "incomprehensible that if a statute authorizes a court to delegate responsibility, it cannot do so as a corporate body (by rule) and must act only through individual judges on a case-by-case basis." Pet. App. 7a. The court likewise found no merit in petitioner's claim that a provision of the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B), required an individual delegation of authority to a magistrate judge. According to the court, that provision, which allows a "judge" to designate a magistrate "to conduct hearings," did not alter the longstanding practice of allowing United States Commissioners, the predecessors of magistrate judges, to conduct extradition hearings without being specially appointed in particular cases. Pet. App. 7a-8a.

The court of appeals also concluded that Article III of the Constitution does not require extradition hearings

to be conducted by Article III judges. Pet. App. 8a-13a. First, the court held that a rule authorizing the assignment of a magistrate judge to conduct an extradition hearing does not compromise the institutional independence of the Article III judiciary. The court reasoned that "the function performed by the judicial officer in certifying extraditability has not historically been considered an exercise of the 'judicial power of the United States'" (Pet. App. 10a); that extradition proceedings are akin to preliminary examinations routinely conducted by magistrate judges to determine whether probable cause exists to detain an arrested defendant (Pet. App. 10a-11a); and that the integrity of the judicial branch is adequately safeguarded by the authority of Article III judges to appoint and remove magistrate judges (Pet. App. 12a). The court also noted that Rule 9 was promulgated by Article III judges. Pet. App. 12a.

Second, the court of appeals held that the rule authorizing the assignment of magistrate judges to conduct extradition proceedings did not violate petitioner's personal rights under Article III. Although the court acknowledged the importance of an unbiased extradition hearing before an independent tribunal, it held that Article III does not "demand further safeguards to individual liberty than those already chosen by Congress and the judges of the Eastern District." Pet. App. 12a-13a.[2]

ARGUMENT

Petitioner contends (Pet. 9-27) that the local rule in the Eastern District of New York that authorizes the referral of an extradition proceeding to a magistrate

[2] The court of appeals also upheld the district court's conclusion that the evidence was sufficient to establish probable cause to believe that petitioner committed the crimes alleged in the extradition request. Pet. App. 13a-14a.

judge without the specific authorization of an Article III judge violates the statutes governing the powers of magistrate judges and Article III of the Constitution. That claim is without merit and does not warrant further review.

1. The procedure for international extradition has remained unchanged for approximately 140 years. Extradition from the United States occurs only pursuant to a treaty between the requesting nation and the United States. See 18 U.S.C. 3181. Section 3184, whose predecessor was enacted in 1848 to implement extradition treaties with Great Britain and France, see *In re Kaine*, 55 U.S. (14 How.) 103, 109 (1853), sets out the procedures that govern the extradition process.[3] Under that statute, an international extradition hearing is initiated by the filing of a sworn complaint charging the commission of a crime in the requesting country. Upon the filing of the complaint and the issuance of a warrant for the arrest of the individual whose extradition is sought, Section 3184 allows "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States," to hold a hearing. The statute provides that "[i]f, on such hearing, [the judicial officer] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he

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[3] Except for grammatical changes, the pertinent language of Section 3184 is virtually identical to the language of the original law enacted in 1848. See Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. Section 1 of the original Act became Section 5270 of the Revised Statutes in 1876. Section 5270 in turn became 18 U.S.C. 651 in the 1940 edition of Title 18 of the United States Code, and 18 U.S.C. 3184 in the 1948 codification. In 1968, the "technical amendments" in the Federal Magistrates Act changed the word "commissioner" to "magistrate" in Section 3184. See Federal Magistrates Act, Pub. L. No. 90-578, § 301(a)(3), 82 Stat. 1115.

shall certify the same * * * to the Secretary of State." Section 3184 does not authorize the judicial officer to order extradition; instead, pursuant to 18 U.S.C. 3186, the Secretary of State makes the ultimate decision.

After the Secretary of State orders extradition, the extradited person may challenge the Secretary's order by seeking a writ of habeas corpus. In that proceeding, the petitioner may challenge the jurisdiction of the extradition court, the validity and scope of the treaty with the requesting country, and the sufficiency of the evidence supporting the finding of extraditability. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Caplan* v. *Vokes*, 649 F.2d 1336, 1340 (9th Cir. 1981).

Contrary to petitioner's contention (Pet. 25), Section 3184 does not require an Article III judge specifically to authorize a magistrate judge to conduct an extradition proceeding in every case. Instead, the statute provides simply that an extradition proceeding may be conducted by a "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States." In Rule 9, the United States District Court for the Eastern District of New York, which is indisputably a "court of the United States," has authorized magistrate judges to conduct extradition proceedings. Thus, Rule 9 falls within the plain language of Section 3184. Indeed, by distinguishing between "a judge of the United States," who may conduct an extradition proceeding, and "a court of the United States," which may authorize magistrate judges to conduct extradition proceedings, Section 3184 seemingly contemplates that a court may act as a corporate body in appointing magistrate judges to conduct such proceedings.

Nor is there any language in Section 3184 that requires a specific delegation to a magistrate judge in every case. And, as the court of appeals concluded, it

makes little sense to interpret the statute that gives a district court delegation authority to require it to exercise that authority on a case-by-case basis instead of by rule. Finally, nothing in Rule 9 prohibited petitioner from objecting to the delegation of his extradition hearing to a magistrate or requesting that a district judge conduct the hearing. At the least, such a request probably would have resulted in a specific determination by a district judge that petitioner's extradition should be heard by a magistrate judge.[4]

2. Petitioner's principal contention (Pet. 11-18) is that the "automatic[]" delegation of his extradition hearing to a magistrate judge violated Article III of the Constitution. As this Court has explained, however, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986). For example, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." *Swain* v. *Pressley*, 430 U.S. 372, 382-383 (1977); see *Palmore* v. *United States*, 411 U.S. 389, 402 (1973) ("Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III."). Congressional delegation of a judicial function to a non-Article III officer violates Article III only if it intrudes on "the role of the independent judiciary within the constitutional scheme of tripartite government," see

[4] Because Section 3184 plainly supports the district court's general authorization of magistrate judges to conduct extradition proceedings, there is no need to consider petitioner's claim (Pet. 26-27) that the Federal Magistrates Act does not authorize magistrate judges to conduct extradition hearings.

Thomas v. *Union Carbide Agric. Products Co.*, 473 U.S. 568, 583 (1985), or violates a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 218 (1980); see *CFTC* v. *Schor*, 478 U.S. at 848. Petitioner concedes (Pet. 13 n.24) that assigning a magistrate judge to preside over his extradition hearing did not violate his personal right under Article III to an independent tribunal.

Assigning magistrate judges to preside over extradition hearings also does not intrude on the independence of the judiciary. Instead, the practice is permissible because, like other miscellaneous functions performed by Judicial Branch officers, conducting extradition hearings does not threaten the judiciary's role vis-a-vis the other branches of government. See *Ward* v. *Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990) (R.B. Ginsburg, J.), cert. dismissed, 111 S. Ct. 2844 (1991). As this Court long ago held, an extradition proceeding is "of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused." *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888). Conducting preliminary hearings and issuing search warrants are analogous functions that have routinely been assigned by statute, rule, and practice to federal magistrates. These are ancillary functions that the courts are authorized to perform, even though they do not constitute the exercise of the judicial power itself. *Morrison* v. *Olson*, 487 U.S. 654, 681-682 & n.20 (1988). These functions may be assigned to magistrate judges because they do not "lie at the core of the historically recognized judicial power." *Northern Pipeline Constr.*

Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (opinion of Brennan, J.).

Like a search warrant, an extradition order simply grants an Executive Branch officer the authority to take action; it does not compel that action, which the Executive Branch officer may decline to take at his or her option. Moreover, because Congress could have committed the task of making a determination of extraditability solely to the Secretary of State, the participation of non-Article III officers in the hearing process does not raise concerns of Executive Branch encroachment on Judicial Branch prerogatives. See *Thomas* v. *Union Carbide Agric. Products Co.*, 473 U.S. at 589. Thus, "an officer who presides over [an extradition] proceeding is not exercising 'any part of the judicial power of the United States.'" *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993) (quoting *In re Kaine*, 55 U.S. (14 How.) at 120). See *Martin* v. *Warden, Atlanta Pen.*, 993 F.2d 824, 828 (11th Cir. 1993) ("An extradition proceeding is not an ordinary Article III case or controversy.").

In addition to being consistent with the practice in analogous areas, the assignment of extradition hearings to magistrate judges has a substantial pedigree. Magistrate judges and their predecessors, commissioners, have held international extradition hearings for more than 140 years, and the procedure has never been thought to raise constitutional objections based on Article III. The historical acceptance of that settled practice, without any indication that it has generated inter-branch friction, suggests that the practice does not raise significant separation of powers concerns.

Finally, Article III review of a magistrate judge's extradition determination is available through habeas corpus review of the Secretary of State's final decision to order extradition. If, as petitioner argues, an extradition

hearing implicates the judicial power of the United States, the availability of Article III judicial review of the essential features of the extradition decision on collateral review adequately protects the independence of the judiciary. See *Ward* v. *Rutherford*, 921 F.2d at 288. Indeed, petitioner does not suggest that he was prejudiced by the assignment of his extradition to a magistrate judge. To the contrary, he obtained review through habeas corpus of the evidence admitted at the extradition hearing by the magistrate judge; the magistrate judge's determination that probable cause existed to extradite him to Great Britain; and the magistrate judge's refusal to allow him further discovery.

3. Petitioner contends (Pet. 13-17) that the court of appeals' decision conflicts with this Court's decisions in *Peretz* v. *United States*, 111 S. Ct. 2661 (1991), and *United States* v. *Raddatz*, 447 U.S. 667 (1980).[5] In petitioner's view (Pet. 15), those decisions stand for the proposition that a delegation to a magistrate judge is

[5] Petitioner also contends (Pet. 13-15) that the court of appeals' decision cannot be squared with *Gomez* v. *United States*, 490 U.S. 858 (1989). In *Gomez*, however, the Court held only that 28 U.S.C. 636(b)(3), which allows district courts to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," does not authorize the delegation to magistrate judges of jury selection at felony trials. The Court found that the structure and legislative history of the statute showed that Congress had not intended to allow magistrates to preside over any aspect of a felony criminal trial. Because of the statutory basis for its decision, the Court expressly declined to decide whether Article III permits a magistrate to preside at jury selection. 490 U.S. at 872 n.25. Thus, *Gomez* is a purely statutory decision interpreting Section 636(b)(3). That case is inapposite here, because Congress has specifically provided in 18 U.S.C. 3184 that a magistrate may preside over international extradition proceedings.

consistent with Article III only if an "Article III Court decides whether to assign a matter to the magistrate" and an "Article III Court decides whether to accept or adopt the work performed by the magistrate."

Peretz and *Raddatz* do not conflict with the court of appeals' decision. Both *Raddatz* and *Peretz* involved determinations that fell within the "judicial Power of the United States" as that term is used in Article III. Presiding over an extradition hearing is not one of the "'essential attributes' of judicial power," however. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. at 81 (opinion of Brennan, J.). Thus, the Article III limitations those cases imposed on the ability of Congress and the Article III courts to delegate judicial functions to magistrate judges are inapplicable here.

Even if *Raddatz* and *Peretz* had a bearing on petitioner's claim, they would not conflict with the court of appeals' decision here. In *Raddatz*, this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion. The Court held that the delegation of suppression hearings to a magistrate "does not violate Art. III so long as the ultimate decision is made by the district court." 447 U.S. at 683. The court emphasized that "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. Justice Blackmun, concurring, stressed that because the magistrate is subject to the control of the Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685.

Similarly, in *Peretz*, the Court held that allowing a magistrate judge to preside over jury selection at a

felony trial does not violate the "structural protections" of Article III if the defendant consents to the magistrate judge's role. 111 S. Ct. at 2669. The Court reasoned that "[m]agistrates are appointed and subject to removal by Article III judges," *ibid.* (citing 28 U.S.C. 631), and that the decisions "whether to invoke the magistrate's assistance" and "whether to empanel the jury the selection of which a magistrate has supervised" remain "entirely with the district court." *Ibid.* The Court further held that "to the extent 'de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties.'" *Id.* at 2670 (quoting *United States* v. *Peacock*, 761 F.2d 1313, 1318 (9th Cir.) (Kennedy, J.), cert. denied, 474 U.S. 847 (1985)).

Here, as in *Raddatz* and *Peretz*, magistrate judges act under the authority of the district court, and the magistrate judge's decision in the extradition hearing is subject to review by an Article III court in a habeas corpus proceeding. Moreover, because of the nature of proceedings under Section 3184, there is no threat to the independence of the magistrate. Finally, although petitioner complains that his extradition hearing was "automatically" assigned to a magistrate judge, he did not contest that assignment or request that the hearing be conducted by a district judge. Accordingly, he is poorly positioned to argue that he lacked the opportunity to obtain review by an Article III judge. For these reasons, petitioner's Article III claim is without merit.[6]

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[6] Petitioner also contends (Pet. 16) that the court of appeals' decision conflicts with *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). That case held that a resident of the United States who proffers sufficient evidence of his citizenship may not be deported by executive order alone, but must be accorded a judicial trial on the issue of citizenship. See *Ward* v. *Rutherford*, 921 F.2d at 288 n.4. That decision therefore has little bearing on the question whether a citi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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zen can be extradited after a hearing before a neutral and detached decisionmaker. Moreover, because a citizen may not be deported, deportation constitutes a determination that the deportee is not a citizen. Thus, the determination whether a person is subject to deportation implicates a vital liberty interest. By contrast, an international extradition proceeding determines only whether there is sufficient evidence to warrant an individual's surrender for offenses allegedly committed in another country.